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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. ~~1000~~ 60

NICK JANKOVICH AND PAUL JANKOVICH,
CO-PARTNERS, DOING BUSINESS AS
CALUMET AVIATION COMPANY,
Petitioners.

vs.

INDIANA TOLL ROAD COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF INDIANA.

MEMORANDUM OF THE CITY OF GARY, INDIANA, AS AMICUS CURIAE IN SUPPORT OF THE PETITION.

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THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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MEMORANDUM OF THE CITY OF GARY, INDIANA, AS AMICUS CURIAE IN SUPPORT OF THE PETITION.

INTEREST OF CITY OF GARY, INDIANA.

The decision below invalidates in toto the Airport Zoning Ordinance of the City of Gary. That ordinance was the governmental means chosen by Gary to protect safe and unobstructed approaches to the airport, to assure adjacent land use compatible with airport operations, and to serve these societal ends economically and with fairness to all. The decision below destroys the ordinance and

precludes any recourse to airport zoning. It relegates Gary to financially prohibitive acquisition of property interests as the only way to protect its public airport. It outlaws airport zoning in reliance upon which existing investments were made and future improvements planned. It undercuts the main bulwark upon which Gary's participation in the National Airport Plan under the Federal Airport Act was predicated. Gary therefore has a vital interest in being heard in defense of the integrity of its ordinance.

REASONS FOR GRANTING THE WRIT.

It would be pointless to repeat the considerations requiring plenary reivew by this Court which the petition sufficiently marshals. The importance of airport zoning in the scheme of air transportation is self-evident. Furthermore, the very fact that the decision below blanketly bans airport zoning of itself amply shows its indefensibility. And the arbitrariness of this *a priori* nullification of airport zoning is emphasized by the particular circumstances.

Thus, the Grand Calumet River divides the south boundary of the airport property from the north boundary of the toll road property. The river is the boundary. The toll road was not simply built on the river edge of the toll road property line. It was in fact constructed partly on the river bed itself. The toll road shifted the river bed north a distance varying from 100 to 175 feet; it brought the north line of the river bed 175 feet closer to the south line of the airport property, approximately the width of the river (R. 594-596, Pl. Exs. 15, 16). And the toll road was not built on the surface of the land. It was elevated about 30 feet above the surface of the land (Pl. Ex. 15, Def. Ex. A).

To construct a toll road partly on the river bed, to shift

the river bed the width of the river across the edge of an existing property line, and to elevate the road 30 feet above the surface on which it is built is surely land use which can be constitutionally regulated by zoning. To limit the height of the structure at that point is even less demanding than an ordinary setback requirement from a lot line. This is not a dirt road on the surface of the land used by a farmer to carry his milk to the dairy or his grain to the barn.

Nor can it be tenably claimed that the decision below rests upon an adequate and independent state ground. The predicate of the Federal Airport Act is that local government has the power to zone property adjacent to a public airport to assure compatible land use. The potent financial incentive of the grant-in-aid program is the federal means used to activate exercise of the power which exists. Judicial nullification of the fact of power makes operation of the federal scheme impossible. Extension of judicial nullification to a few key states like California, Illinois, and New York would bring the National Airport Plan to a standstill. Since the premises of the Federal Airport Act are that (1) local power to zone exists, and that (2) federal financial stimulus can be reliably expected to activate the exercise of that power, judicial denial of the existence of any power which can be energized is totally inconsistent with the federal scheme. A state decision in conflict with a federal predicate can hardly rest on an adequate and independent state ground. Furthermore, since the essential source of the decision below is a misreading of the federal commands enunciated in *United States* v. *Causby*, 328 U. S. 256, and *Griggs* v. *Allegheny County*, 369 U. S. 84, it can hardly qualify as based on an autonomous state ground.

CONCLUSION.

The petition for a writ of certiorari should be granted in order that the constitutional place of airport zoning in governmental regulation of air transportation be firmly and authoritatively fixed.

Respectfully submitted.

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April, 1964.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1964

No. ~~1060~~ 60

NICK JANKOVICH AND PAUL JANKOVICH, Co-Partners Doing Business as Calumet Aviation Company,

Petitioners,

vs.

INDIANA TOLL ROAD COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

BRIEF FOR RESPONDENT IN OPPOSITION.

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THE ROTHROP-GARNER PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Question Presented	1
Statutes Involved	2
Statement	2
Argument	6

AUTHORITIES CITED.

Cases.

Ackerman v. Port of Seattle, amended opinion at 55 Wash. 2d 400, 348 P. 2d 664, unamended opinion at 329 P. 2d 210	9, 11
Board of Zoning Appeals of Decatur v. Jehovah's Witnesses, 233 Ind. 83, 117 N. E. 2d 115	11
Capitol Airways, Inc. v. Indianapolis Power and Light Co., 215 Ind. 462, 18 N. E. 2d 776	10
Cramp v. Board of Public Instruction, 368 U. S. 278	11
Finney v. Johnson, 242 Ind. 465, 179 N. E. 2d 718	11
Fox Film Corp. v. Muller, 296 U. S. 207	11
Goldsmith v. City of Indianapolis, 208 Ind. 465, 196 N. E. 525	11
Griggs v. Allegheny County, 369 U. S. 84	9
Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority, 111 So. 2d 439 (Fla. 1959)	8
Pennsylvania Coal Co. v. Mahon, 260 U. S. 393	8
U. S. v. Causby, 328 U. S. 256	9

United States v. 4.43 Acres of Land (N. D. Tex.), 137 F. Supp. 567 8

United States v. 48.10 Acres of Land (S. D. N. Y.), 144 F. Supp. 258 8

United States v. Virginia Electric & Power Co., 365 U. S. 624 9

Yara Engineering Corp v. Newark, 132 N. J. L. 370, 40 A. 2d 559 11

Statutes.

Federal Airport Act, as amended (60 Stat. 170, 78 Stat. 158, 49 U. S. C. § 1101) 2

Indiana Acts 1927, ch. 43 p. 119, Burns 1956, Repl. § 14-103 10

Indiana Acts 1945, ch. 190, § 9, p. 591; 1949, ch. 109, § 6, p. 252, Burns 1964 Repl. § 14-422 (Indiana enabling statute) 2

Indiana Tall Structures Act (5 Burns Ind. Stat. § 14-327, 1963 Cum. Supp.) 2

Ordinance No. 2897 of Gary, Indiana 2

Miscellaneous.

1 Metzenbaum, Law of Zoning, 70-76 (2d ed. 1955) 11

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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion below is correctly stated in Appendix A of the Petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

Whether a city can take an easement for low-level aircraft flights over privately-owned land situated in the direct path of a runway, by the mere enactment of a zoning ordinance without payment of compensation.

STATUTES INVOLVED.

The statutes involved are Ordinance No. 2897, as set forth in Appendix B of the Petition, and the Indiana enabling statute set out in Appendix E thereof.

The Federal Airport Act[1], portions of which are set out in Appendix C of the Petition, is not involved, as it has nothing to do with rights of ownership of Indiana property or the authority of Indiana municipalities to enact zoning ordinances.

The so-called Indiana Tall Structures Act set out in Appendix D of the Petition is not involved, as it did not become effective until April 1, 1957.[2] The complaint was filed below on July 26, 1956 (R. 5).

STATEMENT.

Petitioners' statement is accepted, with the following amplifications and corrections:

Petitioners were lessees of only a portion of the real estate comprising the airport, for the purpose of operating thereon the business of maintaining and servicing airplanes, selling parts, accessories and gasoline, training students in flying and other crafts and skills relating to aircraft, and other related activities (Pl. ex. 4, R. 570). The lease granted them the use of the runways and other airfield facilities in connection with the operation of their business.

The City of Gary, acting through its Board of Aviation

1. Petitioners apparently seek to invoke this statute because of the reference to zoning laws in Sec. 11(4) appearing at the top of page 22a of the Petition. This subsection, however, was not inserted in the Act until March 11, 1964 (Petition, p. 18).

2. Sec. 17 of the Act, omitted from Appendix D, provides that, "the same shall be in full force and effect from and after April 1, 1957."

Commissioners, retained full control over the operation of the airport in all matters relating to its public use (R. 960, 965, 1082, 1085, 1089, 1092, 1095, 1098, 1101, 1104, 1107, 1114, 1118, 1174, 1177, 1209, 1212, 1215, 1218, 1221, 1226, 1243, 1247).

Prior to construction of the road, respondent and the City of Gary entered into a written agreement, adjusting and settling disputes and controversies as to the location of the road and related matters, such as the changing of the location of the Calumet River, provision for possible extension of the northwest-southeast runway (not here involved), the effect of the road upon sewer facilities, the closing of certain streets, and the defining of various other property rights of the parties. The route proposed by respondent was approved by the City[1], subject to certain designated modifications and changes. As consideration the respondent agreed to pay the City of Gary $1,500,000.00. The agreement was approved by the Board of Aviation Commissioners (R. 949).

The petitioners asserted below that their business was damaged as a result of the alleged violation by respondent of the ordinance (R. 5-16). As a basis for their claim, the petitioners contended that, "zoning provisions constituted easements appropriated by the City which became a part of our leasehold." (Petitioners' brief below, p. 24).

The area in controversy is south of the north-south runway. The north edge of the road is 1,043 feet south of the end of the runway and is elevated 24.6 feet higher than the runway. This affords a glide angle of 42.4 to 1 to the runway as it now exists (R. 939).

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1. In view of this agreement the present interest of the City of Gary as amicus curiae is of questionable significance. Any legal points suggested by its memorandum in support of the petition are fully covered by this brief and will be given no separate treatment.

The South Shore Railroad is located 1,349 feet south of the end of the runway, at right-angle thereto. This is an electrically powered railroad. It receives its power from a series of overhead cables, elevated 41½ feet above the level of the runway and supported by poles extending 56.2 feet higher than the elevation of the runway. These cables carry 1,500 volts of direct current (R. 917, 932, 1228-1232).

An electrical transmission line is located 1,435 feet south of the runway and at right-angle to it. There are two circuits on this line. One carries 34,500 volts and the other 4,000 volts. The line is supported by poles extending approximately 44 feet above the level of the runway (R. 917, 1181, 1187).

During 1954, pursuant to request of petitioner, Nick Jankovich, the City of Gary installed a series of six obstruction light poles in a line running approximately at right-angle to the runway. These poles have lights mounted on top of them for the purpose of warning pilots of the obstructions in the form of the electrical transmission lines and the overhead power system of the South Shore Railroad (R. 917, 939, 979, 1269).

The obstruction light 89 feet west of the projected centerline of the runway is 65.2 feet higher than the elevation of the runway and is 1,413 feet south of the runway. This affords a glide angle of 21.7 to 1 to the runway as it now exists (R. 939).

The obstruction light 82 feet east of the projected centerline of the runway is 61.5 feet higher than the elevation of the runway and is 1,386 feet south of the runway. This affords a glide angle of 22.5 to 1 to the runway as it now exists (R. 939).

Harold Zweig, City Engineer of the City of Gary, testified as follows:

> "We were primarily concerned with the east end of the east-west runway because the location of the Toll Road as originally planned formed an obstruction, an additional obstruction to the Airport which we did not have previously. Now, the reason our discussion centered around the east-west, not north-south, is that the north-south runway already had obstructions over which the Toll Road did not offer any additional obstruction and that in all our discussions we knew that the obstruction on the north-south runway, existing obstructions were greater than what the Toll Road would provide." (R. 1347).

After construction of the road petitioners' income from aircraft grossing 15,000 pounds or more increased in each year for which actual income figures were placed in evidence (Pl. ex. 20, p. 5; R. 795).

The alleged encroachment cannot be stated to have reduced the actual glide angle, or to have caused the runway to be "unusable for aircraft grossing 15,000 pounds or more." (Petition, p. 7) as such statement is contrary to the facts as enumerated above and as accepted by the Supreme Court of Indiana. In argument respondent will show that this aspect of the case constitutes an independent and local issue requiring denial of the writ.

ARGUMENT.

I.

NO NEW CONCEPT APPLIED.

In considering this case the Supreme Court of Indiana made a clear distinction "between zoning regulations which merely restrict the enjoyment and use of property through a lawful exercise of the police power, and a taking of property for a public use, for which compensation must be paid." (Petition, p. 7a). The Court below did not hold that all airport zoning is invalid. It merely held that the particular ordinance in question was void "insofar as it purported to authorize the taking of private property without compensation therefor." (Petition, p. 10a). By this holding the Court below reaffirmed one of the fundamental constitutional safeguards of our nation. There is no reason to deduce that it has become obsolete.

Petitioners, however, refer to public airport zoning in terms that are far too general. They make broad references to diminution of use of adjoining land, and concede that even this may reach a magnitude which constitutes a taking, yet they would impose no limitation upon the use of a zoning ordinance by a municipality to carve out an easement across adjoining land as a direct extension of its runways. They accept as datum the statement of this Court in *Griggs* v. *Allegheny County*, 369 U. S. 84, 90, that, " 'an adequate approachway is as necessary a part of an airport as is the ground on which the airstrip itself, is constructed . . .' ", but they fail to recognize a taking when it is effected by a zoning ordinance.

Petitioners cite and quote from a varied array of material

in an attempt to indicate that zoning is the prescribed and authorized panacea for the elimination of obstructions to the landing and taking-off of aircraft at modern airports. Careful scrutiny indicates, however, that such material recognizes in clear language that there are limitations upon the use of airport zoning. For example, there is reference to a policy of the Civil Aeronautics Administration requiring that a city prevent obstructions by zoning, "if possible and within its powers." (Petition, p. 16). Language of this nature is found throughout the material contained in the petition. An agreement between the City of Gary and the Civil Aeronautics Administration is quoted as containing a provision that, "Insofar as is within its powers and reasonably possible," a sponsor will accomplish the desired objective, "either by the adoption and enforcement of a zoning ordinance and regulations or by the acquisition of easements or other interests in lands or airspace, or by both such methods . . ." (Petition, p. 23). This indicates a recognition of the fact that there are times when a zoning ordinance is inadequate and the acquisition of an easement is required.

The Indiana enabling act set forth in Appendix E of the petition certainly recognized the limitation. By its terms it gave municipalities the authority to establish approach zones, but it also deemed it necessary to grant authority to "acquire by condemnation, upon the payment of due compensation * * * the right to prevent the erection of * * * structures * * * within such zone or zones which interfere with such gliding angle * * *" (Petition, p. 30a-31a). Of course, if this act had attempted to permit such acquisition without payment of due compensation, it would be subject to the same attack as the ordinance in question.

The federal government certainly recognizes the requirement that easements for the glide angle needed for landing

and take-off must be acquired by condemnation proceedings and payment of just compensation. As pointed out by the Court below, this is shown by the condemnation proceedings in *United States* v. *48.10 Acres of Land* (S. D. N. Y. 1956), 144 F. Supp. 258 and *United States* v. *4.43 Acres of Land* (N. D. Tex.), 137 F. Supp. 567, for air easements over property adjoining federal bases.

Petitioners cite *Harrell's Candy Kitchen, Inc.* v. *Sarasota-Manatee Airport Authority*, 111 So. 2d 439 (Fla. 1959), as being in emphatic conflict with the Court below. This is not so. *Harrell* involved a building which did "not lie directly in the path of any runway but considerably to the side of the direct approach area. . . ." (111 So. 2d 444). Nor was there any contention or finding that the zoning ordinance established an easement across the real estate in question as contended by petitioners and found by the Indiana Supreme Court in the instant case. Moreover, the land-owner, on appeal to the Supreme Court of Florida, abandoned the question of unlawful taking without compensation, and no question in this regard was ever before that court (111 So. 2d 442).

Petitioners assert that zoning is indispensable as a means of adjusting conflicting property and community demands, that the essence of civilized society is the adjustment of such competing demands, and that acquisition of necessary approachways by purchase or condemnation is financially prohibitive. This argument, however, is defeated by the eloquent simplicity of the statement of Mr. Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 416:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

II.

NO IMPORTANT QUESTION REMAINS UNANSWERED.

A question that has been answered is no longer a question of importance. *U. S.* v. *Causby*, 328 U. S. 256, and *Griggs* v. *Allegheny County*, 369 U. S. 84, have given a clear and unequivocal answer to the question as to the rights of owners of property adjacent to the ends of runways, over which low-level flights must be made:

> "We start with *United States* v. *Causby* (U. S.) supra, which held that the United States by low flights of its military planes over a chicken farm made the property unusable for that purpose and that therefore there had been a 'taking,' in the constitutional sense, of an air easement for which compensation must be made. * *
>
> "A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned? That the instant 'taking' was 'for public use' is not debatable. For respondent agreed with the C. A. A. that it would operate the airport 'for the use and benefit of the public,' that it would operate it 'on fair and reasonable terms and without unjust discrimination,' and that it would not allow any carrier to acquire 'any exclusive right' to its use.
>
> "The glide path for the northeast runway is as necessary for the operation of the airport as is a surface right of way for operation of a bridge, or as is the land for the operation of a dam. See *United States* v. *Virginia Electric & Power Co.*, 365 U. S. 624, 630, 5 L. ed. 2d 838, 845, 81 S. Ct. 784. As stated by the Supreme Court of Washington in *Ackerman* v. *Seattle*, 55 Wash. 2d 401, 413, 348 P. 2d 664, 671, 77 ALR 2d 1344, '. . . . an adequate approach way is as necessary a part of an airport as is the ground on which the

> airstrip itself, is constructed. . . .' Without the 'approach areas,' an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough." (369 U. S. 88-90.)

No better statement can be made of the constitutional standards to be applied in such cases. Petitioners concede that there was a taking of an air easement which, in turn, inured to their use under their lease. They must also accept the consequence that by constitutional standards compensation must be paid for such easement, and that, therefore, a zoning ordinance is not an acceptable substitute. This is the basis for the decision below. It is sound, and needs no review.

III.

INDEPENDENT GROUNDS SUPPORT THE DECISION BELOW.

Although the Court below reviewed pertinent decisions of this Court, its opinion was primarily grounded on state law concepts of real property, and clearly involved an interpretation of the zoning ordinance in question. The Court found that under Indiana law a land owner is the owner of the airspace above his property to the extent that such airspace may reasonably be used by him, citing Indiana Acts 1927, ch. 43, p. 119, Burns 1956, Repl. § 14-103 and *Capitol Airways, Inc.* v. *Indianapolis Power and Light Co.*, 215 Ind. 462, 18 N. E. 2d 776 (1938) (Petition, p. 5a). The Court framed the issue as one involving both "Article 1, § 21 of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States." (*Id.*, p. 3a). Both of these constitutional provisions were set forth verbatim in the opinion below (*Id.*, p. 4a). The ordinance

in question was interpreted as taking and appropriating "the ordinarily usable airspace of property adjacent to the Gary Airport without the payment of compensation" (*Id.*, p. 8a) —an interpretation binding on this Court. *Cramp* v. *Board of Public Instruction*, 368 U. S. 278. Among the other non-federal authorities relied upon were: *Finney* v. *Johnson*, 242 Ind. 465, 179 N. E. 2d 718 (1962); *Board of Zoning Appeals of Decatur* v. *Jehovah's Witnesses*, 233 Ind. 83, 117 N. E. 2d 115 (1954); *Goldsmith* v. *City of Indianapolis*, 208 Ind. 465, 196 N. E. 525 (1935); *Ackerman* v. *Port of Seattle*, amended opinion at 55 Wash. 2d 400, 348 P. 2d 664 (1960), unamended opinion at 329 P. 2d 210 (1958); *Yara Engineering Corp.* v. *Newark*, 132 N. J. L. 370, 40 A. 2d 559 (1945); and 1 Metzenbaum, Law of Zoning, 70-76 (2d ed. 1955). This analysis leads inexorably to the conclusion that the decision below rests upon independent non-federal grounds, adequate to support the judgment. There is thus a clear lack of jurisdiction in this Court. *Fox Film Corp.* v. *Muller*, 296 U. S. 207.

Furthermore, as heretofore indicated, petitioners' action for damages was based upon the theory that respondent's road wrongfully encroached upon the glide angle at the south end of the north-south runway, that this interfered with the use of the runway by heavier aircraft, and that as a consequence petitioners' business was diminished. Respondent contended that before and after the construction of the road the controlling obstacles were the power lines south of the runway, as shown by the scientific and uncontroverted measurements and the testimony of the City Engineer as set forth above in respondent's amplification of the statement of the case, that as a consequence the road added no obstruction, and, therefore, the road caused no damage to petitioners' business. This is confirmed by petitioners' evidence that their income from

heavier aircraft actually increased in each year following completion of the road (Pl. ex. 20, p. 5; R. 795).

The Court below accepted respondent's contention, as indicated by the statement of the Court that, "the power lines which are adjacent to, parallel with, are much higher than the toll road complained of." (Petition, p. 10a). This resolves an independent and local issue of proximate cause, in a manner requiring a judgment in favor of respondent. Thus, the decision below is correct, without regard for the question sought to be raised by the petition.

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 1964.

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR PETITIONERS

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1. The decision below is in conflict with the decision of the Alabama Supreme Court in *Baggett* v. *City of Montgomery*, 8 CCH Aviation Cases 18,137 (December 12, 1963). The city of Montgomery enacted an airport zoning ordinance embracing "all land within a radius of two miles of the airport" (*id.* at 18,137). The ordinance limited the use of designated land to "agricultural uses, horticulture, one-family residences, and flying fields"; it restricted lots for residential purposes to

certain sizes; it prohibited apartments and duplex houses; and it provided that "no structure or tree shall exceed two and one-half stores or thirty-five (35) feet in height..." (*ibid.*). The policy underlying the ordinance was expressed in virtually the same terms as the Gary ordinance (*id.* at 18,138). And provision for variance was made in virtually the same terms as the Gary ordinance (*id.* at 18,139).

The Alabama Supreme Court held that the ordinance had a valid scope for operation on its face and that it could not therefore be illegalized because of anticipated arbitrary application in particular circumstances. Said the Court (*id.* at 18,138).

> In the light of the provisions of the Airport Zoning Act, it occurs to us that the city was empowered to adopt an ordinance containing as it did a blanket or uniform restriction as to height applicable to the entire area embraced within the ordinance, and also to limit as it did the types of structures that could be erected in such area. This they could do, provided the restrictions were in whole or in part reasonably related to all or part of the area embraced in the ordinance. Unless all of the restrictions had no reasonable or fair application to any part of the area, we would not be justified in striking down the ordinance as an arbitrary and unreasonable usurpation of the police power. We must keep in mind the protection against airport hazards that the legislature had in view as expressed in the Airport Zoning Act.

The Court observed that the provision for variance, and the adequate hearing procedure in conjunction with it, sufficiently safeguarded against arbitrariness (*id.* at 18, 138-18, 139). See also, Strunck, *Airport Zoning And Its Future*, 50 ABAJ 345 (April 1964).

The court below took an opposite tack. According to it "the passage of the ordinance" of itself constituted an appropriation of "the ordinarily usable air space of property adjacent to the Gary airport without payment of compensation," and its nullification was therefore required without regard to the provision that "an aggrieved landowner might apply for a variance. . ." (Pet. p. 8a). Reliance by respondent (Opp. pp. 9-10), as by the court below, upon this Court's decisions in *Causby* and *Griggs* to justify this sterilization of governmental potency to regulate land use alone demonstrates the importance of review by this Court to check the grave misapplication of its decisions.

2. Respondent's stress of other obstructions to access to the airport is wholly beside the point (Opp. pp. 4-5, 11). These other obstructions were nonconforming uses which preexisted the ordinance, and negotiations to remove them had been in progress but were terminated as futile when the toll road was built (R. 544, 594, 704-705). For the toll road became the permanent limiting obstruction which constituted the effective bar to access, unlike the other removable obstructions (R. 594, 691, 697, 716). This was the necessary finding of the trial court when it rendered judgment for the petitioners in the sum of $164,000, and this finding was undisturbed by the court below which invalidated the ordinance on the sole and exclusive ground that it was void on its face. Advertence by the court below to the "power lines which are adjacent to, parallel with, . . . [and] much higher than the toll road" was one basis for its rejection, unclear in its logic, of petitioners' contention that if respondent thought its land had been taken it should have sought compensation by inverse condemnation proceedings

(Pet. p. 10a).* But the court below did not hold that the construction of the toll road had not violated the ordinance and that petitioners had not been injured by it. It simply rendered these factors irrelevant by its holding that the ordinance "was wholly void. . ." (Pet. p. 10a).

3. Chivying with the evidence does not obscure the central fact that the ordinance was never challenged as, and the court below never held that it was, arbitrary in its specific application to the toll road construction. It was attacked as, and was held by the court to be, void on its face because it prescribed limitations on the use of property adjacent to the airport. It is this blanket proscription of airport zoning which poses the vital question that this Court should review.

Respectfully submitted,

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May 1964

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* "Inverse condemnation is the popular description of an action brought against a governmental entity having the power of eminent domain to recover the value of property which has been appropriated in fact, but with no formal exercise of the power." *Martin v. Port of Seattle*, Wash. S. Ct., No. 36,996, decided April 23, 1964, sl. op. p. 1, n. 1.

BRIEF AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 60

NICK JANKOVICH AND PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY, *Petitioners,*

vs.

INDIANA TOLL ROAD COMMISSION, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

BRIEF AMICI CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

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see inside front cover

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INDEX

Subject Index

	Page
Interest of Amici Curiae	1
Summary of Argument	3
Argument	5
1. Airport Operators	5
2. The Gary Zoning Ordinance	6
3. Zoning Against Obstructions Around Airport Valid Exercise of Police Power	7
4. Airport Zoning Ordinance Not Invalid By Fact Aircraft May Fly Over Property—Taking Distinguished	11
5. Record Does Not Sustain Overturning the Ordinance	19
Conclusion	22

Table of Authorities

Baggett v. *City of Montgomery*, 160 So. 2d 6 (Ala. 1963)	9, 20
Banks v. *Fayette County Board*, 313 S.W. 2d 416 (C.A. Ky. 1958)	9
Block v. *Hirsch*, 256 U.S. 135	10
Bowling Green-Warren County Airport Board v. *Long*, 364 S.W. 2d 167 (C.A. Ky. 1962)	9
Brown Holding Co. v. *Feldman*, 256 U.S. 170	10
Burnham v. *Beverly Airways*, 311 Mass. 628, 42 N.E. 2d 575 (1942)	9
Consolidated Rock Products Co. v. *City of Los Angeles*, 57 Cal. 2d 515, 370 P. 2d 342 (1962), appeal dismissed 371 U.S. 36	10, 11
Eubank v. *Richmond*, 226 U.S. 137	8
Euclid v. *Ambler Realty Co.*, 272 U.S. 365	4, 7, 8, 9, 20
Goldblatt v. *Town of Hempstead*, 369 U.S. 590	4, 10, 20
Gorieb v. *Fox*, 274 U.S. 603	8, 9
Griggs v. *Allegheny County*, 369 U.S. 84	3, 4, 5, 6, 11, 12, 13, 14, 15, 19, 22

Page

Hadacheck v. *Sebastian*, 239 U.S. 394 10
Harrell's Candy Kitchen, Inc. v. *Sarasota-Manatee Airport Authority*, 111 So. 2d 439 (Fla. 1959) 9
Laurel Hill Cemetery v. *San Francisco*, 216 U.S. 358 10
Miller v. *Schoene*, 276 U.S. 272 10
Mugler v. *Kansas*, 123 U.S. 623 10
Murphy v. *California*, 225 U.S. 623 10
Nectow v. *Cambridge*, 277 U.S. 183 8
Pennsylvania Mining Co. v. *Mahon*, 260 U.S. 393 11
Reinman v. *Little Rock*, 237 U.S. 171 10
Roarke v. *City of Caldwell*, 32 U.S. Law Week 2089 (Idaho July 30, 1964) 9
Slaughter-House Cases, 83 U.S. (16 Wall.) 36 10
United States v. *Brondum*, 272 F. 2d 642 (5th Cir. 1959) 18
United States v. *Causby*, 328 U.S. 256 ..... 3, 4, 11, 12, 13, 14, 15, 17, 19, 22
United States v. *Central Eureka Mining Co.*, 357 U.S. 155 10
United States v. *48.10 Acres of Land*, 144 F. Supp. 258 (S.D. N.Y. 1956) 16, 18
United States v. *452.13 Acres of Land*, 207 F. Supp. 323 (N.D. Fla. 1962) 18
United States v. *4.43 Acres of Land*, 137 F. Supp. 567 (N.D. Tex. 1956) 16, 18
United States v. *Moy*, 241 U.S. 394 22
United States v. *National Dairy Prod. Corp.*, 372 U.S. 29 22
United States v. *Rumely*, 345 U.S. 41 22
United States v. *765.56 Acres of Land*, 164 F. Supp. 942 (E.D. N.Y. 1958) aff'd. 276 F. 2d 264 (1960) 18, 19
United States v. 72.35 Acres of Land, 150 F. Supp. 271 (E.D. N.Y. 1957) 19
United States v. *64.88 Acres of Land*, 244 F. 2d 534 (3d Cir. 1957) 17
United States v. *357.25 Acres of Land*, 55 F. Supp. 461 (W.D. La. 1944) 19
Washington ex rel. Seattle Title Trust Co. v. *Roberge*, 278 U.S. 116 8

Page

Welch v. *Swasey*, 214 U.S. 91 ..... 8, 9
Western v. *McGehee*, 202 F. Supp. 287 (D. Md. 1962) 18
Yara Engineering Corp. v. *Newark*, 132 N.J.L. 370, 40 A. 2d 559 (1945) 9
Zahn v. *Board of Public Works*, 274 U.S. 325 9

STATUTES AND REGULATIONS

49 U.S.C. § 1110(3) 2
49 U.S.C. § 1110(4) 2
14 C.F.R. § 151.11(f) 2
5 Burns' Indiana Statutes § 14-422 21

OTHER

Rhyne, *Municipal Law*, (1957) §§ 22-24 11
S. Rep. No. 224, 79th Cong., 1st Sess. 3

IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

BRIEF AMICI CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

Interest of Amici Curiae

The National Institute of Municipal Law Officers is an organization composed of over 1200 municipalities located in each of the 50 states, and the District of Columbia. Each member city acts through its chief legal officer known either as a City Attorney, Director of Law, Corporation Counsel, or by a similar title.

This Brief is filed pursuant to Rule 42(4) of the Rules of this Court. The members of the National Institute of

Municipal Law Officers are political subdivisions of states, and this Brief is sponsored by their authorized law officers.

The issues presented in this case vitally affect every municipality in the United States served by a public airport. The Indiana Supreme Court would forbid municipalities to protect the physical safety of the general public by airport zoning laws imposing height limitations on structures, adjacent to airports, which might invite air disasters. The effect of its decision is to prohibit as unconstitutional any and all airport zoning laws enacted for safety purposes.

The conclusion of the Supreme Court of Indiana is directly opposed to long standing United States Congressional policy expressed in requirements for the grants-in aid under the Federal Airport Aid Act. The 1946 Act required assurances from municipal airport operators that existing airport hazards would be mitigated and new ones prevented. (49 USC § 1110 (3)). Federal Regulations provide that airport zoning is an acceptable basis for making this assurance. (14 CFR § 151.11(f). This year Congress amended the Act to require additional assurances "including the adoption of zoning laws" that the use of neighboring land would be "compatible with normal airport operations." (49 USC § 1110(4)).

The conclusion below is also opposed to express enabling legislation in 42 States, and the decisions of this Court. Its effect is to impose upon public airport operators, stripped of the benefit of any police power regulation, a choice to (1) either compromise with the safety standards formulated by the Federal Aviation Agency or (2) assume a huge financial burden to pay neighboring property owners not to erect obstructions or (3) curtail operations at their airports, to the detriment of the municipalities they serve, as well as the nation at large.

The effort of your *amici* is to urge this Court not to withdraw the police power from the nation's cities so as to force the payment of compensation beyond anything commanded by *United States* v. *Causby*, 328 U.S. 256 and *Griggs* v. *Allegheny County*, 369 U.S. 84.

The interest of your amici is to see that the public airport operators who, as the federal grant-in-aid program itself testifies, were admittedly incapable of financing all the necessary airport construction and development before the *Griggs* case (S. Rep. No. 224, 79th Cong., 1st. Sess.) and whose problems have been compounded by the *Griggs* case shall not be further disabled in their difficult effort both to provide for the public safety and to provide and maintain adequate public airport service.

Summary of Argument

Zoning to assure compatibility between neighboring property owners in the use they make of their respective properties has long been recognized as a valid exercise of the police power. An airport operator, whether the federal government, a private person, a public agency other than the local municipality, or a municipality itself, is such a property owner seeking compatibility with its neighbors and seeking to be compatible with them. The local municipality may use its police power to assure such compatibility by enacting an ordinance such as Gary's just as it may assure compatibility between neighboring residential and commercial districts. The fact that the airport operator may be the agency of government exercising the police power cannot affect this result.

The City of Gary enacted its airport zoning ordinance to protect the general public, both in the air and on the ground near the airport, from air disasters resulting from hazardous obstructions. As such the ordinance satisfies

the traditional constitutional tests of *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, for valid zoning in the exercise of the police power in that it bears a substantial relationship to public safety and, based as it is on standards developed and sanctioned by the federal government, is not arbitrary or unreasonable.

There is a distinct and controlling difference between (a) such an exercise of the regulatory power by a municipality in the interest of safety and (b) the potential liability of an airport operator, in extreme cases, to compensate a property owner in the neighborhood of an airport because of the consequences of aircraft flying too low, too frequently and too disturbingly over his property. It is only actual aircraft flights of the *Griggs* type which can occasion a taking of an easement through the air. An airport anti-obstruction height restriction, like any other height restriction or set-back ordinance, has no relationship to the quality and quantity of aircraft flights which trigger the application of *Causby* and *Griggs*. Such an ordinance may limit the owners use of his property but is not thereby rendered invalid.

The airport zoning ordinance is not a substitute for any condemnation required by *Griggs*. Indiana law and the Federal Constitution require the payment of compensation when property rights are acquired. It is, of course, true that such an ordinance might have particular applications which would be unconstitutional. But speculation as to potential confiscatory application in some instances cannot overcome the presumption of contitutionality of the ordinance, even with regard to its application in the particular case. Besides, in this case Respondent has made no showing of any such unconstitutional application and therefore, under *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, there is no basis for holding that the application of the

Gary Ordinance would be unconstitutional to this plaintiff. There is even less warrant for holding, as the Indiana Supreme Court has done, that the entire ordinance, and indeed, any airport zoning ordinance, is necessarily invalid.

ARGUMENT

1. Airport Operators

In this country airports are owned both by public and private agencies. There are several different types of public owners. Washington National Airport and Dulles International Airport are owned by the federal government in the State of Virginia. Military airports are owned by the federal government in many of the states. State agencies which have no legislative power are often the owners of airports as in the case of Boston's Logan International Airport owned by the Massachusetts Port Authority. In some instances such as the Greater Pittsburg Airport involved in the *Griggs* case, the owner of the airport is the county and not the municipality which is principally served. And in other cases, such as the instant case, the municipality may itself own the airport. It is this latter circumstance which appears to have led the Indiana Supreme Court to see in the present ordinance a "taking" of property for the use of the city as such rather than the exercise of the police power to preserve the public safety from particular hazards.

If a municipality enacts airport zoning regulations for safety purposes because a privately-owned airport is located within its environs, surely it cannot be said that the municipality is taking property for its own use. The result should be no different where the airport is municipally owned. The validity of such a zoning ordinance should be appraised without considering the immaterial

element that in any particular case the airport may happen to be owned by the enacting municipality rather than by a private operator or another public agency at the federal, state or county level. The two capacities in which such a municipality acts are wholly independent of each other.

2. The Gary Zoning Ordinance

The error of the Supreme Court of Indiana stems from a failure to understand just what the Gary Airport Zoning Ordinance is and, more particularly, what it is not.

What is under review is an ordinance which, according to its preamble, seeks to avoid "airport hazards [which] endanger the lives and property of users of the Gary Municipal Airport and the occupants of land in its vicinity." The ordinance is a limitation on the heights of structures in the airport area because it is necessary in the interest of the public health, public safety and general welfare that creation or establishment of airport hazards be prevented. It is a legislative determination that the interests of safety, both of the property owners themselves and their neighbors, and of the traveling public using the airport, require the prevention of structures at heights which might invite air disasters. (Record, pp 151, 152).

This airport zoning ordinance is not, in purpose or effect, a substitue for just compensation. In a situation where an aerial easement has been taken by the public under the exceptional circumstances alleged in *Griggs* v. *Allegheny County*, 369 U.S. 84, the Federal and Indiana Constitutions require the payment of compensation. This is what the Indiana Supreme Court missed. Obviously where the disturbing quality and quantity of aircraft overflights is so extreme so as to constitute a taking of property under the *Griggs* doctrine no local ordinance can undo that result.

3. Zoning Against Obstructions Around Airport Valid Exercise of Police Power

Airport zoning, as a reasoned legislative solution to a problem generated by our time and our technology, possesses no constitutional defect. Such legislation serves the interests of the general public in protection from aircraft disasters and the fostering of air commerce as a significant factor in the developing prosperity of this country. Regulating the interests of a landowner in air above his property is well within the constitutional framework for legislative protection of the public interests.

The constitutionality of zoning ordinances to assure compatibility of adjoining land uses was settled by this Court's landmark decision in *Euclid* v. *Ambler Realty Co.* There the question resolved itself utimately to whether a restriction on the use of real property could be imposed under the police power without the payment of compensation. The Court answered in an emphatic affirmative, and in language which applies fully to the new technology involved in this case, remarked:

> "Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify

> traffic regulations, which before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable." (272 U.S. at pp. 386-387).

The constitutionality of laws enacted under the police power which imposed height restrictions on private property for safety purposes was sustained even before *Euclid* in *Welch* v. *Swasey*, 214 U.S. 91.

The Indiana Supreme Court found merit in the oversimplified premise that any height restriction on the use of land to protect the public from air disasters constituted an appropriation of air space for which the property owner was entitled to compensation. Contrary to the tests of *Euclid* and *Welch*, it declared the Gary ordinance to be void on its face without inquiring into its reasonableness, its vital relation to public safety, the nature of any alleged appropriation that had resulted, and the flexibility permitted under the Constitution to use the police power to resolve the unique problems generated by the burgeoning growth of air commerce.

In the zoning cases which have come before this Court, the argument is repeatedly made that zoning ordinances operate to effect a "taking" of plaintiffs' property. Yet, no zoning ordinance has ever been declared invalid by the Court on such ground. Such laws have been invalidated only where they were clearly arbitrary and unreasonable, *Eubank* v. *Richmond*, 226 U.S. 137; *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116; or they bore no substantial relation to the public health, safety, morals or general welfare, *Nectow* v. *Cambridge*, 277 U.S. 183. The "taking" argument was conclusively discredited in a zoning context in *Euclid* and *Gorieb* v. *Fox*, 274 U.S. 603, which expressly referred to limitations on "the height

of buildings." See also *Zahn* v. *Board of Public Works*, 274 U.S. 325.

An airport zoning ordinance, like any zoning law enacted under the police power, must be upheld unless it offends the clearly defined constitutional test enunciated in *Euclid* v. *Ambler Realty Co.* in that its "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." (272 U.S. at p. 395).

Clearly, the height restrictions imposed by the ordinance meet the test of reasonableness, based as they are on airport obstruction standards developed by the Civil Aeronautics Administration. And obviously, the ordinance, seeking to prevent obstruction hazards, bears more than a substantial relation to public safety.

This reasoning underlies the state court decisions which have upheld airport zoning. *Baggett* v. *City of Montgomery*, 160 So. 2d 6 (Ala. 1963); *Harrell's Candy Kitchen, Inc.* v. *Sarasota-Manatee Airport Authority*, 111 So. 2d 439 (Fla. 1959)).[1]

In addition to zoning laws (*Euclid*, *Welch*, *Gorieb* and *Zahn*, supra,) this Court has time and again confirmed the validity of regulations restricting the use of land without compensation to the landowner. It has upheld, as valid exercises of the police power, statutes or ordinances which have required the shutting down of gold mines,

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[1] In *Burnham* v. *Beverly Airways*, 42 N.E. 2d 575 (Mass. 1942). *Banks* v. *Fayette County Board*, 313 S.W. 2d 416 (C.A., Ky. 1958) and *Bowling Green-Warren County Airport Board* v. *Long*, 364 S.W. 2d 167 (C.A., Ky. 1962), the courts discussed airport zoning in contexts which indicated that they had had no reservations concerning their constitutionality. *Yara Engineering Corp.* v. *Newark*, 132 N.J.L. 370, 40 A. 2d 559 (1945), cited below, held only that the municipality had not been authorized by the state legislature to enact zoning regulations. *Roarke* v. *City of Caldwell*, 33 U.S. Law Week 2089 (Idaho 1964) followed the Indiana Supreme Court below.

United States v. *Central Eureka Mining Co.*, 357 U.S. 155; slaughter houses, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36; breweries and distilleries, *Mugler* v. *Kansas*, 123 U.S. 623; cemeteries, *Laurel Hill Cemetery* v. *San Francisco*, 216 U.S. 358; billiard halls, *Murphy* v. *California*, 225 U.S. 623; livery stables, *Reinman* v. *Little Rock*, 237 U.S. 171; and brickyards, *Hadacheck* v. *Sebastian*, 239 U.S. 394. It has upheld the validity of regulations which limited the income which an owner could derive from his property. *Block* v. *Hirsh*, 256 U.S. 135; *Brown Holding Co.* v. *Feldman*, 256 U.S. 170. It has even approved laws requiring property owners to destroy their property without compensation in the public interest. *Miller* v. *Schoene*, 276 U.S. 272. In none of these cases did the Court find a "taking" of property, despite the fact that the result of the legislative exercise of the police power caused severe economic detriment to the property owner.

As recently as 1962, this Court upheld a town safety ordinance which absolutely prohibited the use to which the property in question was put and which was "its most beneficial use." *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 citing with approval *Hadacheck* v. *Sebastian*, 239 U.S. 394 where no "taking" was found to result from a regulation forbidding the use of property as a brickyard and causing a diminution in its value from $800,000 to $60,000.

Even more recently this Court dismissed for want of a substantial federal question an appeal from a decision of the California Supreme Court which upheld, as a valid exercise of the police power, a zoning ordinance which completely prohibited the use of property for the only economic purpose for which it was fit. *Consolidated Rock Products Co.* v. *City of Los Angeles*, 57 Cal. 2d 515, 370 P. 2d 342 (1962), appeal dismissed 371 U.S. 36.

In *Consolidated*, the California Supreme Court dealt

with *Pennsylvania Mining Co.* v. *Mahon*, 260 U.S. 393, cited by the Indiana court below, wherein this Court struck down a Pennsylvania statute which prohibited the mining of coal in such a way as to cause a subsidence of surface structures. The California court pointed out that the *Mahon* decision preceded this Court's affirmance of the constitutionality of comprehensive zoning ordinances and within such a context has no application (370 P. 2d at p. 350).

4. Airport Zoning Ordinance Not Invalid By Fact Aircraft May Fly Over Property—Taking Distinguished

The basis of the decision below was that all airport zoning is inconsistent with this Court's rulings in *United States* v. *Causby*, 328 U.S. 256, and *Griggs* v. *Allegheny County*, 369 U.S. 84. We see no conflict between the Gary safety ordinance and the doctrine of those cases. The ordinance seeks to avoid obstructions which could cause aviation disasters whereas the two cases deal with the proven effect of a certain extreme quantity and type of actual aircraft flights in the vicinity of an airport.

At least five different theories exist with respect to the nature and extent of the ownership of air space above private property. (See Rhyne, *Municipal Law* (1957) §§ 22-24.) The theory that the landowner owns all the air space above his land without limit or extent (*"ad coelum"*) is clearly unacceptable and has been rejected almost unanimously by the courts. Nevertheless the Indiana Court would invalidate an airport zoning ordinance even where the restrictions relate to air space in which the surface property owner could have no legal ownership and without consideration of any actual interference by aircraft flights. It has thus, in an airport zoning context, resuscitated the

discredited *ad coelum* concept of unlimited air space ownership.

Griggs and *Causby* do *not* stand for the discredited proposition that a property owner has an absolute right of ownership of the airspace above his property such that any "invasion" of it by aircraft entitles him to compensation. In *Causby*, this Court applied the *coup de grace* to that concept which was already *in extremis*.

The doctrine of airport zoning limiting the height of hazardous obstructions and the doctrine of *Causby* and *Griggs* operate in completely different spheres. In the latter an actual physical damage to property is involved. In the case of anti-obstruction zoning we merely have a limitation on the height of structures, which has never been held to constitute compensable physical damage to the affected property. The distinction is manifest if one assumes the case of a new airport with modest air traffic such that the *Griggs* doctrine cannot apply. Obstructions must nevertheless be avoided even for the occasional aircraft using the airport. The police power to adopt an anti-obstruction airport zoning ordinance is not ousted just because some day in the future air traffic might change and compensation to certain adjoining property owners might come to be required under the *Griggs* doctrine.

The Indiana Supreme Court has thus confused two activities which are logically and legally different.

In view of the repudiation of the *ad coelum* doctrine, a property owner can have his rights in airspace "taken" only when the government has transferred unto itself whatever private rights in airspace are actually recognized by the Courts. And *Causby* makes it clear that aircraft overflights may achieve such a result only in extreme circumstances:

> **"Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." (328 U.S. at p. 266).**

Mere flights of aircraft above private property, without more, do not constitute a "taking."

Where, however, flights are "so low and so frequent as to deprive the owner of the substantial enjoyment of his property", there may, under *Causby*, be a taking. *Griggs* said that the taking may be attributed to the airport operator where the airport is so laid out as to make such flights unavoidable. In *Griggs* the property owner's claim was that aircraft regularly passed as low as 30 feet over his rooftop.

Under these circumstances this Court analogized the aircraft glide path to the surface right of way for the operation of a bridge, to impose an obligation upon the airport operator to compensate the injured land owner. The simile, of course, cannot be taken too literally. Before an airport is open for use, there is no highway through the sky interfering with the property owner's enjoyment of his property, whereas the physical construction of a bridge approach over his property takes his property for public use even before traffic begins to roll. Similarly, if the air traffic over a particular parcel of property is not frequent enough to meet the criteria of *Causby* and *Griggs* for any other reason, a highway through the air does not exist, and nothing is taken from the property owner. Such infrequency can occur because the particular airport is not a busy one or because the adjacent property does not lie beneath the established flight paths of aircraft using the airport. It may also occur where a particular runway is rarely used, either because of prevailing winds or because

of preferential runway regulations in force to minimize disturbance of the airport neighbors.

Then again, most aircraft using an airport may, if they regularly fly over a particular parcel of property at all, fly sufficiently high as to be outside the prohibition of *Causby* and *Griggs*. This would also be the case with respect to immediately adjacent property owners where the airport runway ends are situated well within the airport boundaries and where the property lies between rather than under the theoretical extension of the runways. Many of the parcels to which a zoning ordinance such as *Gary's* would apply are sufficiently distant from the airport so that aircraft dispersion, particularly after take-off, causes direct and low overflights to occur, if at all, too infrequently to invoke the taking doctrine of *Causby* and *Griggs*.

In addition there may be lacking the third element necessary for an application of the *Causby* and *Griggs* doctrine i.e. detriment to a degree so markedly beyond what might constitute a common law nuisance as to have crossed the line which separates possibly tortious interference, dependent on the laws of the particular state, into the zone of constitutional deprivation prohibited by the Federal Constitution.

The absence of detriment can occur even in situations involving recurring flights which are relatively low. For example, the only aircraft using a particular airport might be of the Piper Cub variety, which generate little more noise than an ordinary delivery truck. Or the affected property may be put to an industrial use which is perfectly compatible with greater noise volumes.

Griggs and *Causby* do not require constitutional compensation, as the Indiana Supreme Court assumes, every time a property owner can show that aircraft approaching

and departing from an airport occasionally pass directly over his property, or even disturb him on occasion. And yet, in every situation where there is a potential hazard by way of obstructions, it is certainly the business of government, particularly local government, to exercise its police power in the interest of the public safety to avoid disasters whether or not the actual flights which may occur have reached the extreme proportions which alone justify the application of *Causby* and *Griggs*.

The issues involved in the present case and in the *Causby* and *Griggs* cases are simply not related to each other. One structure over 500 feet in height well out from the airport runway can be a hazard not only to the lives of the air traveling public but to all of the residents in the area. Such an obstruction may be prohibited even though aircraft in that location may be so infrequent as to raise no question of the application of *Causby* and *Griggs*. And such a structure should be prevented if no aircraft in that vicinity might normally fly no lower than 600 feet above the surface, an altitude far greater than anything prohibited in *Causby* and *Griggs*.

On the other hand this type of ordinance is not meant to be a substitute for just compensation where the facts of *Causby* and *Griggs* are duplicated and in any such event it could not displace the owner's right to compensation for the taking which would occur. But the duplication of the *Griggs* fact situation, if proved, does not create any additional right to be compensated for the prohibition of the obstructions under the airport zoning ordinance.

The distinction between the right to compensation for actual physical damage incurred as a result of aircraft over-flights in the extreme situations which occurred in *Causby* and *Griggs*, and the alleged right to compensation for an "appropriation" of property by virtue of a zoning

ordinance which merely restricts the height of structures, is too patent to be ignored. This distinction is strikingly analogous to the distinction, repeatedly recognized by the federal courts, between two different rights in air space which the federal government has acquired. The first has been the right to prevent obstructions by height limitations and the second has been the right to fly aircraft through the affected space. Confused attempts to unite the two occurrences as a single event appear in cases where the federal government was condemning air space over private property around federal airfields solely to prevent and eliminate safety hazards.[2]

In these cases, the government condemned what are best described as "obstruction easements" over private property. But the property owners sought damages for "resulting" overflights, contending that the government was actually taking property for purposes of aircraft passage. Such damages were consistently denied, the courts maintained that the government was not taking "avigation" easements to permit the flight of aircraft over the condemnees' property and thus was not obliged to pay for them. The government merely sought to restrict the

---

[2] Where there is no applicable state or municipal zoning, the federal government must, of course, *condemn* blocks of airspace around its airfields to eliminate safety hazards. Federal agencies have no power to regulate land uses within the sovereign States. Thus, the citation by the Indiana Supreme Court of *United States* v. *45.10 Acres of Land*, 144 F. Supp. 258 (S.D. N.Y. 1956), *United States* v. *4.43 Acres of Land*, 137 F. Supp. 567 (N.D. Tex. 1956) for the proposition that the federal government has recognized the need to condemn and pay just compensation to eliminate flight hazards is misleading. These cases prove only what is self-evident, that the federal government, lacking authorization to exercise zoning powers within the sovereign states, must, where there is no state or local zoning, exercise the power of eminent domain to prevent the erection of airport obstructions.

height to which property could be developed, just as airport zoning regulations do.

In *United States* v. *64.88 Acres of Land*, 244 F. 2d 534, 535-6, (3 Cir. 1957), the Court of Appeals made the following lucid analysis:

> "... [A]ppellee insists that in effect the government is, or may be, imposing on his land a greater servitude than is actually asserted. Appellee is apprehensive that the government may be taking, or as a result of this taking will claim, a right to fly aircraft very low over his land. The government denies that it is taking any right to fly in the air space above appellee's land or that it contemplates claiming any right of flight beyond that which, under the rationale of *United States* v. *Causby*, 1946, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206, exists at all times without any taking from the landowner below. In this connection it is pointed out that the elevations defining the altitude above which no obstructions are to be permitted are substantially lower than any flight path which could lawfully be used or approved for approaching the present Greater Pittsburgh Airport under the regulations of the Civil Aeronautics Authority.
>
> "On this record it must be accepted that the claimed right of clearance is merely a provision for assuring that space shall be unoccupied and vision unobstructed above a designated altitude. Unquestionably, this is in aid of avigation. But no flight easement is mentioned or to be inferred, much less claimed, in the present pleadings and, therefore, no servitude can be imposed except for the asserted and precisely limited rights of clearance. . . . If any subsequent low flying of aircraft

> over appellee's land should occur and should be said to invade property rights, the acquisition of the right to keep that space clear will not have conferred any attendant right to fly through it."

The same result was reached on an identical predicate in *United States* v. *Brondum*, 272 F. 2d 642 (5 Cir. 1959); *United States* v. *452.13 Acres of Land*, 207 F. Supp. 323 (N. D. Fla. 1962); *Western* v. *McGehee*, 202 F. Supp. 287 (D. Md. 1962); *United States* v. *765.56 Acres of Land*, 164 F. Supp. 942 (E.D. N.Y. 1958) aff'd. 276 F. 2d 264 (1960); *United States* v. *48.10 Acres of Land*, 144 F. Supp. 258 (S.D. N.Y. 1956); *United States* v. *4.43 Acres of Land*, 137 F. Supp. 567 (N.D. Tex. 1956).

Neither the federal government's condemnation of "obstruction easements" nor a municipality's imposition of height restrictions through zoning involves consideration of the effect of aircraft flights to determine in the first instance, the *extent* of the government's obligation to pay damages, and in the second, the *existence* of the municipal airport operator's obligation to pay any damages at all. As the federal courts clearly point out, should aircraft fly through the restricted area in such a manner as to constitute a prohibited "taking", then property owners who suffer damage from such overflights have their remedy against the federal government notwithstanding the government's acquired right to prevent obstructions. The same remedy against the airport operator is available to property owners whose land is subject to airport zoning regulations. If takings occur in either situation, just compensation will be paid; and the fact that aircraft flights may occur in the air over the property after the enactment of an airport zoning ordinance has no possible rele-

vance to its constitutionality whether the flights be such as to fall short of a "taking" or not.

Another pertinent aspect of the "obstruction easement" cases is the federal courts' consideration of existing zoning height restrictions of the conventional community development type in determining the extent of the damages to which the landowner is entitled. Thus, the obligation of the United States to pay for an appropriation of air space may be substantially diminished or even extinguished by conventional height restrictions on property imposed by municipalities adjacent to federal airfields. *United States* v. *765.56 Acres of Land*, 164 F. Supp. 942, 947 (E.D. N.Y. 1958), aff'd. 276 F. 2d 264; *United States* v. *72.35 Acres of Land*, 150 F. Supp. 271, 273 (E.D. N.Y. 1957). See also *United States* v. *357.25 Acres of Land*, 55 F. Supp. 461 (W.D. La. 1944), where the government's liability was reduced because of an existing local *airport* zoning ordinance.

The Indiana Supreme Court has invalidated a local law in reliance upon the principles of two decisions of this Court which were misapplied to the facts of the case. The court mistakenly viewed the zoning ordinance as a legislative attempt to withdraw from property owners the constitutional rights which had been confirmed in *Griggs* and *Causby*. But these rights were never in danger. The validity of the Gary airport zoning ordinance should not be made to depend upon an independent contingency against which property owners are fully protected.

5. Record Does Not Sustain Overturning the Ordinance

The record in this case discloses neither a claim nor a determination that the Gary airport zoning ordinance contains any features of an arbitrary or unreasonable nature

or that it bears no substantial relation to the public safety. Thus Respondent has not met its most fundamental burden of showing that the ordinance is not a valid police regulation because it offends these constitutional tests prescribed by *Euclid*. Respondent has left the controversy in a posture where, to say the least, the reasonableness of the ordinance is "fairly debatable." And as stated in *Euclid*, where the legislative determination of reasonableness is "fairly debatable, the legislative judgment must be allowed to control."

And only two years ago in rejecting a claim that a local safety ordinance amounted to an unconstitutional taking, the Court reaffirmed the traditional presumption of constitutionality and insisted that it would uphold the ordinance where "the record reveals a dearth of relevant evidence" on the points necessary to evaluate reasonableness. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 595.

Furthermore, *Goldblatt* also disposed of any possible argument by the Respondent that while the ordinance might generally be valid, as applied to it the ordinance has a confiscatory effect. In the absence of facts in the record to support such an argument of particular unconstitutional application, the argument will be rejected by this Court. (369 U.S. at p. 595).

Moreover, the possibility that the Respondent could show that as applied to it the ordinance had a confiscatory effect, does not upset the constitutionality of the ordinance as a whole. In the first place, this ordinance contains a severability clause which preserves the enactment generally even if "the application thereof to any person or circumstance are held invalid". (Record, p. 157). Secondly, the Gary ordinance requires that a variance "shall be allowed where a literal enforcement" would act oppressively on

an individual property owner. Under its terms, the Board of Zoning Appeals would grant relief against any unconstitutional deprivation of property. The ordinance leaves no discretion to deny the variance. See *Baggett* v. *City of Montgomery, supra.* Faced with the Gary variance provision, the Indiana Court below merely said:

> "True, the ordinance provided that an aggrieved landowner might apply for a variance, but there is no provision for compensation in event recourse to such procedure is unsuccessful." (Record, p. 214).

On the other hand, no statute need provide for compensation in the case of an unconstitutional application of its provisions. If a property owner's right which has been held to be beyond the exercise of police power is nevertheless to be extinguished, just compensation must be paid. The statute, however, need not spell this out in order to be valid in its application to situations where unconstitutionality is not involved.

But even if this requirement exists, it is satisfied. The Gary airport zoning ordinance was enacted pursuant to state enabling legislation which also specifically conferred on Gary's Board of Aviation Commissioners the power to condemn rights in air space to prevent hazardous obstructions. (Burns' Ind. Stat. § 14-422). If, in the individual instance, the zoning ordinance would operate confiscatorily in a situation where the granting of a zoning variance would not be in the interest of public safety, the Board is authorized to exercise the power of eminent domain to acquire necessary clearance rights upon payment of due compensation. Any requirement that compensation be provided for is more than met by this statutory provision.

The Indiana Supreme Court, far from deferring to the presumption of constitutionality inherent in the ordinance, accorded it instead a strained and unnatural interpretation to support its holding. Such an interpretation constitutes a radical judicial departure from this Court's long-standing rule to construe statutes so as to avoid doubts as to their constitutionality. *United States* v. *National Dairy Prod. Corp.*, 372 U.S. 29, 32; *United States* v. *Rumely*, 345 U.S. 41, 45; *United States* v. *Moy*, 241 U.S. 394, 401.

Conclusion

In the present case Respondent has attempted no showing whatsoever with regard to the actual aircraft flights over his property and has therefore not even made the beginning of an argument under *Causby* and *Griggs*. It has not even forged the first link in the specious chain of reasoning which leads through *Causby and Griggs* to the invalidation of the Gary Ordinance on their authority.

By coupling possible aircraft overflights with the height restrictions imposed by the Gary airport zoning ordinance, the Indiana Supreme Court devised what it thought to be a constitutional ground for invalidating the ordinance. But there is a sharp distinction between regulation and use, a distinction which is controlling in this case. The two cannot be melded, but must be treated separately to determine their implications with respect to the validity of airport zoning.

It is therefore respectfully urged that the Court reverse the Judgment of the Supreme Court of Indiana and uphold airport zoning regulations which prevent hazards to the public safety both in the air and on the ground in and around an airport.

The Airport Operators Council, whose membership in-

cludes the operators of publicly owned airports handling approximately 80 per cent of the passengers enplaning and deplaning on scheduled flights in this country, authorizes me to say that the foregoing also express their views.

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BRIEF FOR THE PETITIONER

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 60

NICK JANKOVICH and PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY, *Petitioners*,

v.

INDIANA TOLL ROAD COMMISSION, *Respondent*.

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF FOR PETITIONERS

[redacted]

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	3
Summary of Argument	12
Argument.	
I. Airport Zoning Is a Valid Exercise of the Police Power Designed to Assure Land Use Adjacent to the Airport Which Is Compatible With Safe and Efficient Airport Operation	20
A. The Purpose of Airport Zoning Is to Maintain Safe and Unobstructed Approaches to the Airport	21
B. Airport Zoning Is a Constitutional Means of Regulating Land Use of Property Adjacent to an Airport	30
II. The Decision Below Does Not Rest Upon An Independent and Adequate State Ground	51
Conclusion	56

Appendix A: Excerpts From Federal Airport Act	1a
Appendix B: Indiana Tall Structures Act	7a
Appendix C: Indiana Enabling Statute Pertaining to Airport Zoning	13a
Appendix D: FAA Technical Standard Order N18	15a
Appendix E: Statement Describing Technical Standard Order N18	23a
Appendix F: FAA Model Airport Zoning Ordinance, July, 1950	27a
Appendix G: CAA-NIMLO Model Airport Zoning Ordinance, February, 1947	49a
Appendix H: CAA Office of Airports Drawing No. 672	61a
Appendix I: Excerpts From Grant Agreement Between Gary and CAA, June, 1949	63a

AUTHORITIES CITED

Cases:	Page
Abie State Bank v. Bryan, 282 U.S. 765	53
Baggett v. City of Montgomery, 160 S. 2d 6 (Ala.)	41
Block v. Hirsch, 256 U.S. 135	20, 50, 51
Cohens v. Virginia, 6 Wheat. 264	54
Cramp v. Board of Public Instruction, 368 U.S. 278	51
Diamond Glue Co. v. United States Glue Co., 187 U.S. 611	51
Enterprise Irr. District v. Farmers Mut. Canal Co., 243 U.S. 157	53
Fay v. Noia, 372 U.S. 391	53
Ferguson v. Skrupa, 372 U.S. 726	51
Goldblatt v. Town of Hempstead, 369 U.S. 590	16, 21, 39, 43
Gorieb v. Fox, 274 U.S. 603	39
Griggs v. Alleghany County, 369 U.S. 84	11, 18, 48, 49, 50, 52
Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority, 111 So. 2d 439 (Fla.)	40
Hesse v. Rath, 249 N.Y. 436, 164 N.E. 342	34
Hill v. Florida, 325 U.S. 538	54
Jackman v. Rosenbaum Co., 260 U.S. 22	50
Laurel Hill Cemetery v. City of San Francisco, 216 U.S. 358	44, 51
Marsh v. Alabama, 326 U.S. 501	50
Martin v. Port of Seattle, 391 P. 2d 540, n. 1 (Wash.)	45
Minnesota v. National Tea Co., 309 U.S. 551	52
Missouri v. Mayfield, 340 U.S. 1	53
Mugler v. Kansas, 123 U.S. 623	11, 20
Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41	44
Northwest Airlines v. Minnesota, 322 U.S. 292	35
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393	11, 39
Pennsylvania v. Nelson, 350 U.S. 497	54
Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437	53
Prentis v. Atlantic Coast Line Co., 211 U.S. 210	44
Public Utilities Com. v. United States, 355 U.S. 534	44
Queenside Hills Realty Co. v. Saxl, 328 U.S. 80	19, 51
Rayonier, Inc. v. United States, 352 U.S. 315	53
Reinman v. City of Little Rock, 237 U.S. 171	21
Roark v. City of Caldwell, 33 U.S. Law Week 2089 (Idaho S. Ct., July 30, 1964)	42
Seaboard Air Line R. Co. v. Peters, 43 So. 2d 448 (Fla.)	35

Page

Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 54
Smith v. Cahoon, 283 U.S. 553 44
Sneed v. County of Riverside, 219 ACA 221, 32 Cal. Rep. 318 42
State Tax Commission v. Van Cott, 306 U.S. 511 53
United States v. Causby, 328 U.S. 256 .....11, 18, 48, 49, 50, 52
United States v. Central Eureka Mining Co., 357 U.S. 155 39
Village of Euclid v. Ambler, 272 U.S. 365 .....11, 20, 44, 51
Waring v. Peterson, 137 So. 2d 268 (Fla. Ct. App.) ... 41
Welch v. Swasey, 214 U.S. 91 21
Zahn v. Board of Public Works, 274 U.S. 325 21

STATUTES:

Federal Aviation Act of 1958 (72 Stat. 730, 49 U.S.C. § 1301) 24, 25
The Federal Airport Act, as amended (60 Stat. 178, 78 Stat. 158, 49 U.S.C. § 1101) 2, 12, 24-25, 33
Indiana Enabling Statute Pertaining To Airport Zoning (3 Burns Ind. Stat. 14-442) 3
Indiana "Inverse Condemnation" Statute (3-1711, 1946 Repl.) 45
Indiana Tall Structures Act (5 Burns Ind. Stat. 140-347, 1963 Cum. Supp.) 2, 37-38
Ordinance No. 2897, approved September 20, 1949, "Airport Zoning Ordinance of the City of Gary" 2, 4-6

CONGRESSIONAL REPORTS, DEBATES, AND HEARINGS:

H. Rep. No. 784, 78th Cong., 1st Sess. 11 (1943) ..14, 31, 32
H. Rep. No. 1002, 88th Cong., 1st Sess., 2, 6, 15 (1963) 25
H. Conf. Rep. No. 1154, 88th Cong., 2d Sess. in 110 Daily Cong. Rec. 3519 (Feb. 26, 1964) 25
S. Rep. No. 446, 88th Cong., 1st Sess., 2, 3, 40, 24, 25 (1964) 14, 25, 31, 32, 55
109 Cong. Rec. 4648, 15748-49, 15755 .....25, 34, 50
110 Daily Cong. Rec. 373, 375-377 (January 14, 1964).. 25
Hearings before the Aviation Subcommittee of the Senate Commerce Committee on S. 1153, 88th Cong., 1st Sess. 26, 31, 34

Page

FEDERAL AVIATION AGENCY MATERIALS:

CAA, Airport Survey, H. Doc. No. 245, 76th Cong., 1st Sess., 65 (1939) 29, 30, 33
FAA, Air Traffic Activity, Calendar 1962 23
FAA, Model Airport Zoning Ordinance 13
FAA, Small Airports, 9 (1959) 21
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National Airport Plan, Requirements for Fiscal Years, 1963-1967 ..... 32, 35, 37
Office of Airports Drawing No. 672 36
Statistical Review and Resume of Accidents, US Air Carriers, Calendar Year 1960, CAB 1963, 12 31

MISCELLANEOUS:

Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, 11 Law & Contemp. Prob. 539, 542 (1946) 31, 42
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Manion, Law of the Air, 77 (1950) 42
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Rhyne, Municipal Law, 489 (1957) 22, 42
Rhyne, Airports and the Courts (1944) 23, 33, 42
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Smylie, *Constitutionality of Federal Airport Zoning*, 12 Geo. Wash. L. Rev. 1, 25-30 (1943) 42
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2 Yokley, Zoning Law and Practice, 43-45, 61-75 (1953) 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 60

NICK JANKOVICH and PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY,
Petitioners,

v.

INDIANA TOLL ROAD COMMISSION, *Respondent.*

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Supreme Court of Indiana, Judge Jackson dissenting, is reported at 193 N.E. 2d 237 (R. 208). No opinion was written by the Porter Circuit Court, Lake County, Indiana.

JURISDICTION

The judgment of the Indiana Supreme Court was entered on October 24, 1963 (R. 217).[1] Its order denying rehearing was entered on December 17, 1963 (R. 217). An order was entered on February 28, 1964 by Mr. Justice Tom C. Clark extending the time for filing a petition for a writ of certiorari to April 15, 1964 (R. 218). The petition for writ of certiorari was granted on May 25, 1964 (R. 219). 377 U.S. 942. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3). See, *infra*, pp. 51-56.

QUESTION PRESENTED

Whether a municipal ordinance which zones property adjacent to a public airport for the purpose of maintaining safe and unobstructed approaches to the airport constitutes a valid exercise of the police power or is a taking of property without compensation in violation of the Fourteenth Amendment of the United States Constitution.

STATUTES INVOLVED

Ordinance No. 2897 of Gary, Indiana, approved September 20, 1949, has the short title of "Airport Zoning Ordinance of the City of Gary" (R. 151-161). The Federal Airport Act, as amended (60 Stat. 170, 78 Stat. 158, 49 U.S.C. § 1101) is set out in pertinent part in Appendix A, *infra*, pp. 1a-6a. The Indiana Tall Structures Act (5 Burns Ind. Stat. 140-327 *et seq.*, 1963 Cum. Supp.) is set out in full in Appendix

[1] The practice of the Indiana Supreme Court is not to render a judgment separate from the opinion. The directions contained at the conclusion of the opinion constitute the judgment. The directions are executed by the lower court upon certification to it of the opinion.

B, *infra*, pp. 7a-13a. The provision of the Indiana enabling statute pertaining to the adoption of airport zoning by a municipality (5 Burns Ind. Stat. 14-442) is set out in full in Appendix C, *infra*, pp. 13a-15a.

STATEMENT

In October 1939, the City of Gary, Indiana, enacted an ordinance declaring that it needs and shall acquire, improve, operate, and maintain an airport (R. 145-146, 23). On May 29, 1947, the United States granted land to Gary "for and in consideration of the development and operation of the . . . demised premises as a public airport in perpetuity . . . and for the benefit which shall accrue to the United States . . . from the continued use of such property as an airport . . ." (R. 147, 23). Automatic reversion of the title to the United States was provided "if and in the event that the Administrator of Civil Aeronautics or his successor in function determines that the premises have not been developed for airport purposes within a reasonable period of time . . . , or that after having been so developed the premises have ceased to be used or are necessary for airport purposes" (R. 149). Gary promised that "such airport will be operated as a public airport on fair and reasonable terms and without unjust discrimination" (*ibid.*).

The demised land encompassed a triangular area of approximately 610 acres bounded on the south side by the Grand Calumet River (R. 29, 159, 161). The master plan of the airport called for the construction of three runways on this land, an east-west runway, a northwest-southeast runway, and a north-south runway (Pl. ex. 10, R. 56-58). The east-west runway has not been constructed (R. 55). The northwest-southeast runway, planned for a length of 6,000 feet and a

width of 150 feet, has been constructed to a length of 4,600 feet and a width of 100 feet (*ibid.*). The north-south runway, immediately involved in this proceeding, was planned for a length of 3,900 feet and a width of 150 feet (*ibid* It has been constructed to a width of 100 feet; its original length just prior to 1950 was 3,100 feet; this 3,100 feet length was extended in 1954 or 1955 by 300 feet on the north end and 200 feet on the south end; the 300 feet extension at the north end is not part of the master plan; there still remains 600 unconstructed feet at the south end of the runway in accordance with the specifications of the master plan; the north-south runway, which now has a length of 3,600 feet, would have an overall length of 4,200 feet were the 600 feet at the south end constructed as planned (R. 26, 36, 55, 68, 76-77, 78, 81). Federal and municipal funds were expended for this airport construction (R. 31, 68, 193).[2]

In September 1949, before the inception of airport construction, the City of Gary enacted an airport zoning ordinance to regulate and restrict the height of structures and the use of property in the vicinity of the airport (R. 151-161, 56-58). As presently pertinent the operative part of the ordinance provides that (R. 153-154):

> Section 4: HEIGHT LIMITS—Except as otherwise provided in this ordinance, no structure shall be erected, altered or maintained, in any airport approach zone or airport turning zone to a height in

[2] The Grant Agreement of June 1949 between the City of Gary and the Civil Aeronautics Administration shows that the United States obligated itself in the sum of $166,000 as its initial contribution to the construction of the airport (*infra*, p. 64a). Not in evidence, the Grant Agreement has been obtained from the Federal Aviation Agency, and relevant parts of it are excerpted in Appendix I, *infra*, pp. 63a-73a. Further Grant Agreements were entered into on May 22, 1950, June 28, 1951, and August 12, 1957.

excess of the height limit herein established for such zone. For purposes of this regulation, the following height limits are hereby established for each of the zones in question:

(a) Turning Zone, 150 feet

(b) Outer Area Approach Zone, 150 feet

(c) *Inner Area Approach Zone as indicated (extending 6,000 feet from the end of the proposed runway) not to exceed height greater than permitted of 40 to 1 slope.* [Emphasis supplied.]

(d) Transition Zone, height limit based on 7 to 1 slope from edge of inner area approach zone to maximum height of 150 feet

All height limits shall begin at elevation of 590 feet above sea level.

The "40 to 1 slope" required by Section 4(c) of the ordinance pertains to "glide angle" or "glide slope". Glide angle or slope is determined as the ratio of horizontal distance to vertical elevation. A 40 to 1 glide angle or slope means 40 feet of forward horizontal distance for one foot of vertical elevation. (R. 73.)

Made part of the ordinance was a detailed zoning map and layout plan (R. 153, 158-161). Exempt from the ordinance was any existing structure and any structure whose construction or alteration had been begun and could with diligence be completed in two years (R. 154). Provision for variance was made if compliance with the ordinance "would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of this Ordinance" (R. 154-155). A detailed hearing procedure was prescribed (R. 155-156).

The preamble to the ordinance stated that "airport hazards endangered the lives and property of

users of the Gary Municipal Airport and the occupants of land in its vicinity, and in effect reduces the size of the area available for the landing, taking off, and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investments therein . . ." (R. 151). To overcome these hazards, the preamble stated, the Board of Aviation Commissioners of the City of Gary has "adopted certain standards for the safe descend, landing and ascend of aircraft and for the proper and safe use of the Gary Municipal Airport and landing field in respect to height and location of structures and the use of land . . ." (R. 152). Accordingly, the preamble concluded, enactment of the ordinance "is necessary in the interest of the public health, public safety, and general welfare," to the end that "creatic or establishment of airport hazards be prevented to the extent legally possible by exercise of the police power . . ." (*ibid.*).

On March 20, 1950, subsequent to enactment of the ordinance, petitioners entered into a 20 year lease, with an option for an additional 10 year period, to operate the airport (R. 162-177, 44). Pursuant to that lease, petitioners expended about $400,000 to build hangars and purchase equipment and facilities for the operation of the general business of the airport (R. 209, 24, 28, 59, 65-66).

This was the situation which prevailed when respondent Indiana Toll Road Commission came on the scene. It constructed a toll road in an east-west direction parallel with the south side of the Gary Municipal Airport approximately at right angles to the north-south runway (R. 24, 46-49, 93, 184-187). The Commission acquired the right-of-way in 1954 and 1955

(R. 50, 68). It completed construction and opened the road for traffic in 1956 (*ibid.*). The road was constructed along the Grand Calumet River which constituted the south boundary of the airport (R. 24, 29, 159, 161). The immediate area to the south of the airport is comprised of marshes (R. 131). The road was constructed partly on the river bed of the Grand Calumet River; the toll road shifted the river bed north a distance varying from 100 to 175 feet; at the point where the toll road intersected the aerial approach to the north-south runway, the north line of the river bed was moved over the existing south line of the airport property by 175 feet, approximately the width of the river (R. 53-54, 184-185). The road was raised about 30 feet above the surface of the land on which it was built (R. 184-187). The north edge of the road is 1,043 feet south of the existing south end of the north-south runway (or 443 feet from the south end of the proposed but not yet constructed length of the runway, *supra*, p. 4), and is elevated 24.6 feet higher than the south end of the north-south runway (R. 186-187, 100-101).

Under the ordinance the permitted height of structures at the location that the toll road interseets the approach to the north-south runway is 11.08 feet beginning at an elevation of 590 feet above sea level.[3]

[3] The ordinance requires that the height limitation shall be measured "from the end of the proposed runway" (R. 154). The proposed south end of the north-south runway is 443 feet from the north edge of the road. Thus, the present distance between the existing south end of the runway and the north edge of the road is 1,043 feet (R. 186-187, 100), and substracting from this distance the proposed but not yet constructed length of 600 feet at the south end of the runway yields 443 feet (*supra*, p. 4). Applying the 40 to 1 ratio to this 433 feet distance yields 11.08 feet. The ordinance further provides that "All height limits shall begin at elevation of 590 feet above sea level" (R. 154).

Since the land surface at that point of the toll road is 583 feet above sea level (R. 185, 47), thus 7 feet less than the 590 feet beginning mark, the actual permitted height of structures at that place is 18.08 feet (11.08 + 7). As the elevation of the toll road is 612.8 feet above sea level (*ibid.*), and thus at an actual height above the land surface of 29.8 feet (612.8 − 583), the toll road exceeds the permitted height by 11.72 feet and thus penetrates the protected air space by that 11.72 feet. At the original south boundary of the airport, before the toll road moved the river bed north a distance of 175 feet, the permitted elevation of structures is 22.45 feet.[4]

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[4] Adding 175 feet to 443 feet gives 618 feet, and applying the 40 to 1 ratio to this distance yields 15.45 feet. Since this height limit begins at 590 feet above sea level and the land surface is at 583 feet above sea level, the actual permitted height elevation is increased by seven feet allowing a height of 22.45 feet above ground level.

The opinion of the court below contains a number of erroneous statements of fact which do not affect the result:

(a) The opinion states that, at the point of intersection, the toll road is "approximately 743 feet south of the south end of said proposed [north-south] runway" (R. 209-210). The correct figure is 443 feet (*supra*, p. 7, n. 3). The court below is under a misapprehension that there are 300 unconstructed feet, rather than 600 unconstructed feet, at the south end of the existing runway (R. 209, see *supra*, p. 4).

(b) The opinion states that "the permitted elevation of structures at the location of the toll road was approximately 18½ feet" (R. 210). The permitted elevation is 18.08 feet.

(c) The opinion states that the toll road projected "itself into the prohibited area about 6½ feet" (R. 210). The actual penetration is 11.72 feet.

(d) The opinion states that "three runways were constructed" (R. 209). The east-west runway has not been constructed (*supra*, p. 3).

The consequence of the penetration of the protected air space was to reduce the glide slope on the aerial approach to the north-south runway from about 38 to 1 to about 27 to 1, causing the north-south runway to be unusable for aircraft grossing 15,000 pounds or more (R. 71-81, 84-87, 88-89, 38-44, 59-64, 66-68). The toll road became the permanent limiting obstruction (R. 38, 53, 71-72, 75, 79, 82, 84). Until the toll road's construction, access to the north-south runway had been limited to a much lesser extent by the catenary system supporting the wires carrying the current that powers the trains of the Chicago South Shore and South Bend Railroad, located about 321 feet south of the toll road (R. 37-38, 41-43, 51-53, 75, 81-82, 100, 185, 187, 189). Obstruction lights had been erected to the south of the catenary system to warn approaching aircraft of its presence, and the lowering or removal of the catenary system would permit the lowering or removal of the obstruction lights as well (*ibid.*, R. 137-138). Negotiations had been in progress to lower the catenary system, and with it the obstruction lights, but these were terminated as futile when the toll road was built (R. 37-38, 51-53, 82). For the toll road became the permanent limiting obstruction which constituted the effective bar to access, unlike the other removable obstructions (R. 37-38, 41-43, 51-53, 75, 81-82, 137-138).

To secure relief from the harm caused by the impaired use of the north-south runway, petitioners sued in the Porter Circuit Court, Lake County, Indiana, for injunctive relief and damages (R. 1-10). In defense, at the *nisi prius* level, respondent on demurrer to the complaint first took the position that the zoning ordinance "was, as a matter of law, an act done in the exercise of said City's police power"; that it "con-

stituted a restriction of the use of property, and did not, as a matter of law, constitute an appropriation of property within the meaning of either the Constitution of the State of Indiana or the Constitution of the United States"; but that respondent's own action as a "body politic" constituted a supervening exercise of "its politic power" (R. 12). After rejection of this argument by the Circuit Court (R. 13), respondent at trial switched its position to an attack upon the validity of the zoning ordinance on its face, claiming that it was "defective, unenforceable, void and unconstitutional" in that (R. 56):

> . . . the attempt to establish glide angles or slopes in controlling the height of structures and objects near an airport by zoning is the unconstitutional taking of property without payment of compensation and is offensive to and violative of the 5th and 14th Amendments of the Constitution of the United States and Article 1, Section 21 of the Constitution of the State of Indiana;
>
> . . . the enactment of the purported airport zoning ordinance is an unlawful and unreasonable exercise of the police powers of the City of Gary, Indiana, in attempting, through zoning, to do that which must be done under the City's right of eminent domain. . . .

Rejecting this argument, the Circuit Court ruled that (R. 58):

> With reference to the third objection that the zoning ordinance is attempting to do under police powers what the courts say should be done under the right of eminent domain, I don't feel this statute imposes an obligation upon the airport authority to condemn that which immediately rests . . . without the physical boundaries of the airport as established under the statute of 1945.

After trial, while denying injunctive relief, the Circuit Court awarded petitioners a judgment "in the sum of $164,000.00 and costs" (R. 20).

On appeal to the Indiana Supreme Court, that court held that the zoning ordinance was "wholly void. . ." (R. 217). Citing this Court's decisions in *United States* v. *Causby*, 328 U.S. 256, and *Griggs* v. *Allegheny County*, 369 U.S. 84, it held that "the reasonable and ordinary use of air space above land is a property right which cannot be taken without the payment of compensation" (R. 212-213). Citing this Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, it held that "the taking or appropriating of private property by the government for a specific public use. . . . can be effected only if compensation is provided" (R. 214). Citing this Court's decision in *Village of Euclid* v. *Ambler*, 272 U.S. 365, it held that respondent was under no initial obligation to seek a variance, for no "exhaustion of administrative remedies" is required "when a zoning ordinance is invalid as an entirety" (*ibid.*). And, citing this Court's opinion in *Mugler* v. *Kansas*, 123 U.S. 623, it held that it was free to look through the declaration of policy in the ordinance and treat it as an artifice (R. 215). It therefore invalidated the ordinance on the sole and exclusive ground that it "was unconstitutional in that it purported to appropriate, without compensation, the reasonable and ordinary use of the property on which appellant [respondent here] constructed its toll road" (R. 210).

SUMMARY OF ARGUMENT

I

The central question presented is whether the police power is exercisable to zone property within the vicinity of a public airport for the purpose of maintaining safe and unobstructed access to the airport, or whether the governmental means to serve this end are restricted to purchase or condemnation. Limitations on land use by zoning is classic regulation within the scope of the police power immune from constitutional attack unless indisputably shown to be arbitrary and unreasonable. Such a showing is precluded by the role of airport zoning in protecting airport approaches from dangerous obstruction hazardous to safe and efficient airport operation.

A.

Airport zoning is designed to protect from encroachment air space needed for safe take-off and landing of aircraft. With the emergence of air transportation Government at all levels has resorted to zoning as one means of meeting its public responsibility to provide airport approach protection. Congress just this year, on March 11, 1964, confirmed the especial appropriateness of zoning to prevent airport hazards. It amended section 11 of the Federal Airport Act to add a new subparagraph (4) requiring that the FAA Administrator obtain from the sponsor of airport development written assurance that:

> appropriate action, *including the adoption of zoning laws*, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal

airport operations *including landing and take-off of aircraft.* [Emphasis supplied.]

Congressional endorsement of "adoption of zoning laws" to assure land use compatible with airport operation confirms the actual long-standing practice. The airport approach standards, measuring the air space surrounding the airport which should be free of obstructions to maintain safe take-off and landing, are prescribed by the Federal Aviation Agency in Technical Standard Order No. N18, entitled "Criteria For Determining Obstructions To Air Navigation." To secure adherence to these airport approach standards, the "adoption and enforcement of zoning regulations" is one of the means specifically enumerated in the FAA's standard form project application to which the sponsor must subscribe. And the FAA authors a Model Airport Zoning Ordinance for adoption by local government in which the height and zone limits prescribed are based on the application of federal criteria.

Congressional endorsement and FAA practice are rooted in expert studies advocating airport zoning to protect aerial approaches. Zoning fulfills the need of providing unobstructed air space essential to safety. By the same token it protects the immense investment in airports. Money spent on an airport later made partly or wholly useless by encroachments on the air space necessary to its safe operation is money partly or wholly wasted. Airport zoning is therefore imperative if the twofold purpose of maximizing safety and protecting investment is to be adequately served. These ends cannot be achieved by the acquisition of sufficient property interests because the cost is financially prohibitive. It is therefore "vital that there be adequate zoning. . . . Few steps are of such urgency. Few steps

are so essential to promote safety."[5] Promoting safety and preserving investment underscore the communal importance of airports and the contribution to the general welfare which airport zoning makes. "Airports are not just local assets. They do not just benefit the larger airlines, the private and business pilots and the air travelers, but vitally affect the prosperity, well-being and security of all our citizens."[6]

In this case, the situation of the Gary Municipal Airport precisely fits the federal pattern of municipal development within the aegis of the national system. It is one of the airports which make up the National Airport Plan. The grant agreement between the City of Gary and the Civil Aeronautics Administration obligates Gary as the sponsor to prevent insofar as it can land use in or out of the airport boundaries which would create air hazards, and stipulates "the adoption and enforcement of a zoning ordinance and regulations" as one of the means to this end. The zoning ordinance which Gary adopted in September 1949 was tailored from the then current model ordinance which the Civil Aeronautics Administration had authored in February 1947. The height limits and zones it prescribed were taken directly from the federal criteria then prevailing. And the land on which the airport is constructed was donated by the United States "for the benefit which shall accrue to the United States . . . from the continued use of such property as an airport", with automatic reversion of the title to the United States if, the FAA Administrator determines that "the premises have ceased to be used or are neces-

[5] H. Rep. No. 784, 78th Cong., 1st Sess., 11 (1943).

[6] S. Rep. No. 446, 88th Cong., 1st Sess., 24 (1963).

sary for airport purposes" (*supra*, p. 3). Finally, not only is the Gary Municipal Airport part of the national system of public airports and the Gary zoning ordinance a reflection of federal planning, but Indiana itself has expressed a state-wide concern for protecting local airports by zoning through adoption of a state zoning procedure applicable where local authority has not enacted airport zoning regulations.

B.

It is within this framework of uniform recognition of the indispensability of airport zoning by those who bear the responsibility of government that it is necessary to consider whether the Fourteenth Amendment stands athwart the airport to paralyze regulatory viability by withholding the power to zone adjacent property to assure compatible land use. By maintaining unobstructed aerial approaches airport zoning fulfills the need for preserving access but at the same time diminishes the use to which the adjacent property can be put. Lessened use is of course inherent in regulation and does not by itself constitute a taking. To be sure, while there comes a point at which regulation may cease and become a taking, reasonable airport zoning is well short of that point. Zoning is essential in our crowded society as a means of adjusting conflicting property and community demands. Space, height and use limitations are commonplace and their validity unquestionable. The same need which supports zoning in general supports airport zoning as a particular manifestation of the identical underlying principle.

Accordingly, unless airport zoning is to be *a priori* nullified as beyond any legitimate exercise of police power, the question reduces to whether the ordinance

in this case is on its face so wanting in "reasonableness" (*Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-595) that it is "wholly void" (R. 217). There is no claim or showing that the height limitations the ordinance prescribes are not strictly germane to preserving unobstructed approaches to the airport and essential to maintaining safe flight. The ordinance exempts from its operation existing structures and those which can with diligence be completed within two years of enactment. Current use of property is therefore wholly undisturbed. Nor is future use of property restricted by the ordinance if good cause for variance is shown. And a full hearing procedure is established.

The provision for variance contained in the ordinance is a built-in safeguard against arbitrary application. It distinctively contributes to the validity of the ordinance on its face and precludes any claim of arbitrary application in the absence of recourse to it. It permits melioration of the ordinance to adjust to unforeseen future developments. And without recourse to this remedy, it cannot be said that the ordinance in actual application would be unreasonable, for the means of determining the ultimate incidence of the ordinance have not been exhausted. In this case respondent acquired the adjacent property years after the ordinance was enacted and therefore with full notice of the limitations on its use. Yet it made no effort to seek a variance, thus foregoing the opportunity to show superior equity in its proposed use of adjacent property.

The validity of the ordinance on its face is further confirmed by the "inverse condemnation" procedure which Indiana law establishes. Inverse condemnation

is the popular description of an action brought against a governmental entity having the power of eminent domain to recover the value of property which has been appropriated in fact, but with no formal exercise of the power. Accordingly, if a variance has been sought and refused, and a limitation placed upon the use of property is later judicially found to be a taking, compensation is obtainable via inverse condemnation. Thus, coupling the ordinance with the statutory procedure for inverse condemnation, a constitutionally invulnerable method of controlling land use is established. Regulation under the police power holds sway until the point of taking is reached and then compensation is provided.

The total abstractness of the attack upon the validity of the ordinance on its face is emphasized by the particular circumstances of the toll road construction. To construct a toll road partly on the river bed, to shift the river bed the width of the river across the edge of an existing property line, and to elevate the road about 30 feet above the surface on which it is built is surely land use which can be constitutionally regulated. To limit the height of a structure at that point is even less demanding than an ordinary setback requirement from a lot line which totally bars any construction within the defined area. Although the record is totally silent on the subject, presumably the toll road was built at the place and height considered to be the most convenient for its construction. But the assumed maximum convenience in constructing the toll road could be served only by distinctly disserving the essential need of the airport. The ordinance, however, had intervened to strike the balance of convenience in favor of the airport, subject to reevaluation in a pro-

ceeding to secure a variance. This is the essence of regulation.

Nothing in *United States* v. *Causby*, 328 U.S. 256, nor *Griggs* v. *Allegheny County*, 369 U.S. 84, upon which much reliance is mistakenly placed, supports the view that an airport zoning ordinance is void on its face because it prescribes height limitations on the use of property surrounding the airport. *Causby* and *Griggs* hold that low flights at frequent intervals which significantly diminish the use of property lying below the aircrafts' path result in a taking which requires compensation. These decisions do not reach the question whether the police power is exercisable to zone property adjacent to the airport to prevent future development of land use incompatible with safe and efficient airport operation. The problems are discrete and their resolution not antagonistic. To say that aircraft cannot be flown so low and so often over terrain without taking an easement requiring compensation does not mean that the Constitution licenses the erection of structures so high as to impair safe and efficient flight.

Invalidation of the ordinance thus rests on the bare premise that ownership of the property of itself precludes zoning to regulate its use. According to the court below, " 'Had the . . . [adjacent property owner] chosen to erect flagpoles, factory chimneys, or tall buildings across the whole of its land, and several times as high as its power line, it was within its rights notwithstanding it might have entirely prevented the landing of airplanes at . . . [the] airport' " (R. 212). But that doctrine can hardly survive its statement. "The police power is one of the least limitable of governmental powers, and in its operation often cuts down

property rights." *Queenside Hills Realty Co.* v. *Saxl*, 328 U.S. 80, 83. The essence of civilized society is adjustment of competing demands in the use of land and other valuables. This is the traditional function of zoning and airport zoning is no different. The absolutism of the court below is atavistic, and requires rejection in order to maintain governmental viability in assuring through zoning compatible land use between the airport and its neighbors for the good of the community.

II

The decision below does not rest upon a nonfederal ground independent of the federal ground and adequate to support the judgment. It was by force of this Court's decisions, and the federal constraint exerted by them, that the decision below was reached. The least that must therefore be said, giving maximum weight to the possible existence of a state ground, is that the federal and state grounds are inextricably entwined, and hence this Court has jurisdiction because the decision below cannot be ascribed to an *independent* state basis. But even if there were a state ground deemed independent, it would not qualify, as it must, under the twin requirement that it be an *adequate* predicate for the judgment. For the decision below, by nullifying airport zoning, is in irreconcilable conflict with federal aviation policy expressed in the Federal Airport Act. A state decision in collision with the premise of a federal statute can hardly rest on a ground to which federal jurisdiction is indifferent. It would be an odd sort of *adequate* state ground, *sufficient* to sustain the judgment, which at once founders on the Supremacy Clause.

ARGUMENT

I. AIRPORT ZONING IS A VALID EXERCISE OF THE POLICE POWER DESIGNED TO ASSURE LAND USE ADJACENT TO THE AIRPORT WHICH IS COMPATIBLE WITH SAFE AND EFFICIENT AIRPORT OPERATION.

Based on the premise that the usable air space above land is property which cannot be taken without compensation, the court below nullifies the airport zoning ordinance on its face, unrelated to any claim or finding of specific arbitrary application, concluding that it is a "wholly void" enactment "invalid as an entirety" (R. 214, 217). The central question therefore is whether the police power is exercisable to zone property within the vicinity of a public airport for the purpose of maintaining safe and unobstructed access to the airport, or whether the governmental means to serve this end are restricted to purchase or condemnation. The question calls for reconciliation in a contemporary setting of the ancient tension between the police power and eminent domain. *Mugler* v. *Kansas*, 123 U.S. 623, 668-669. The "legislative modification" of the perquisites of property "required from time to time in civilized life" may be effectuated "not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay." *Block* v. *Hirsch*, 256 U.S. 135, 155. To be sure, "there comes a point at which the police power ceases and leaves only that of eminent domain" (*id.* at 156), but zoning does not reach that point unless it can be said that the limitations on land use it establishes "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid* v. *Ambler Realty Co.*, 272

U.S. 365, 395.[7] If the question whether the legislative "determination was an unreasonable, arbitrary or unequal exercise of power is fairly debatable . . . . the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." *Zahn* v. *Board of Public Works*, 274 U.S. 325, 328. For "'debatable questions as to reasonableness are not for the courts but for the legislature'"; "exercise of police power is presumed to be constitutionally valid"; and it "will be upheld if any state of facts either known or which could be reasonably assumed affords support for it." *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 595, 596.

We therefore turn to a particularized consideration of the role of airport zoning in the protection of airport approaches from dangerous obstructions hazardous to safe and efficient aircraft operations.

A. The Purpose Of Airport Zoning Is To Maintain Safe And Unobstructed Approaches To The Airport.

"Aircraft when taking off or landing : . . need space at the ends of the landing strips, known as 'approach areas,' over which they may safely gain or lose altitude."[8] Airport zoning is directed to this problem. "To protect the public interest in public airports by preventing construction or growth of hazards or obstructions in the approach zones of properly located and constructed airports, municipal, state and federal governments have turned to police power zoning to limit the height of structures and objects of natural

[7] See also, *Reinman* v. *City of Little Rock*, 237 U.S. 171, 177; *Welch* v. *Swasey*, 214 U.S. 91, 105-106.

[8] FAA, Small Airports, 9 (1959).

growth in airport approach zones. A municipality may spend large sums from public funds for the very essential purpose of constructing and maintaining an adequate and safe airport to serve its residents, only to have this airport rendered worthless almost overnight by the erection or growth of some obstruction in the airport's approach zones which prevent full use of the landing facilities there made available at public expense."[9] The origin of airport zoning, its widespread incidence, and the union of municipal, state, and federal authority to further it have been described as follows:[10]

> The first suggestion that zoning should be the answer to the problem of airport approach protection came in 1928 when Alameda County, California adopted an ordinance prohibiting the erection or maintaining of any "structure or obstruction to the operation of aircraft at a height in excess of fifty (50) feet upon unincorporated territory . . . within one thousand (1,000) feet of any boundary of a public air navigation facility . . . within the County of Alameda." In 1929, the Board of Port Commissioners of the City of Oakland, California, adopted a similar ordinance. The federal government through the Civil Aeronautics Authority, as early as 1930 and again in 1938 recognized that airport zoning was the "simplest solution . . . and therefore the most satisfactory way that can be adopted . . . to prevent obstructions in the approaches of airports." The Civil Aeronautics Administration has an established policy of inserting in all grant agreements with cities for expenditure of federal funds on public airports the requirement that the city will prevent

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[9] Rhyne, Municipal Law, 489 (1957).

[10] *Id.* at 489, 490-491.

> obstructions, if possible and within its powers, by zoning, acquisition of property interests, or otherwise.
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> * * *
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> A recent review of state airport legislation reveals that airport zoning acts of one type or another have been adopted in all but eight states. These acts are usually denominated Airport Zoning Acts or Municipal Airport Approach Protection Acts and provide for the promulgation and administration of airport approach zoning regulations by subordinate units of government. Many cities have adopted airport zoning ordinances pursuant to the statutes, and the ordinances are apparently working well. Most of the enabling acts have been written or amended so as to be substantially similar to the 1944 model act formulated by NIMLO [National Institute of Municipal Law Officers] and the Civil Aeronautics Administration.[11]

Illustrating the continuing contemporary significance of airport zoning, approval is expected sometime after October 1, 1964 of airport zoning regulations to protect the Chicago-O'Hare International Airport,[12] the nation's busiest airport.[13]

At the heart of airport zoning is the federal interest in airport approach protection expressed in the Fed-

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[11] The pioneer ordinances of Alameda and Oakland are set out in United States Department of Commerce, Aeronautics Branch, Report of the Committee on Airport Zoning and Eminent Domain, December 18, 1930, pp. 12-13. For a tracing and summary of some prominent ordinances, see Rhyne, Airports and the Courts, 173-176 (1944). See also, Note, *Zoning—The Airports And The Land Surrounding It in The Jet Age*, 48 Ky. L.J. 273, 279 (1960).

[12] Letter of August 28, 1964, from J. E. Wenzel, Director, Illinois Department of Aeronautics.

[13] FAA Air Traffic Activity, Calendar 1962, 35.

eral Airport Act. The airport approach standards incorporated in zoning ordinances are based directly on federal criteria promulgated by the Federal Aviation Agency. The FAA's authority in the field of airport approach protection derives primarily from the Federal Airport Act and the role ascribed by Congress to the FAA Administrator to propose and annually revise "a national plan for the development of public airports in the United States . . ." (§ 3).[14] "In order to bring about, in conformity with the national airport plan . . . the establishment of a Nationwide system of public airports adequate to meet the present and future needs of civil aeronautics . . ." (§ 4), Congress adopted a grant-in-aid program under which adherence to federal standards is made the condition of the grant of funds. The Act defines as an "Airport hazard" "any structure or object of natural growth located on or in the vicinity of a public airport, or any use of land

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[14] Further authority is conferred by the Federal Aviation Act of 1958 (72 Stat. 731; 49 U.S.C. § 1301). "Navigable airspace" is defined to mean "airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in take-off and landing of aircraft" (§ 101(24)). "In the exercise and performance of his powers and duties under this Act the [FAA] Administrator shall consider the following, among other things, as being in the public interest: . . . (c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both" (§ 103). "The [FAA] Administrator is authorized and directed to develop plans for, formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to assure the safety of the aircraft and the efficient utilization of such airspace" (§ 307(a)). "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States. . . ." (§ 1108(a)).

near such airport, which obstructs the air space required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft" (§ 2(4)). A "sponsor" in submitting a "project application" for a grant of funds for airport development is required to formulate his proposal "in accordance with standards established by the Administrator, including standards for site location, airport layout, grading, drainage, seeding, paving, lighting, *and safety of approaches*" (§ 9, emphasis supplied). More particularly, as a "condition precedent" to approval of the project, "the Administrator shall receive assurances in writing, satisfactory to him," that *inter alia* (§ 11(3)):

> the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards *and by preventing the establishment or creation of future airport hazards*. [Emphasis supplied.]

And, crucially significant, Congress just this year, on March 11, 1964, made explicit the especial appropriateness of zoning as one means to prevent establishment or creation of airport hazards. Thus, Congress added a new paragraph (4) to section 11 of the Act requiring that the Administrator obtain from the sponsor written assurance that:[13]

> appropriate action, *including the adoption of zoning laws*, has been or will be taken, to the extent

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[13] Public Law 88-280, § 10, March 11, 1964; H. Conf. Rep. No. 1154, 88th Cong., 2d Sess., in 110 Daily Cong. Rec. 3519 (Feb. 20, 1964); S. Rep. No. 446, 88th Cong., 1st Sess., 2, 3, 20-25 (1963); H. Rep. No. 1002, 88th Cong., 1st Sess., 2, 6, 13 (1963); 109 Cong. Rec. 464S, 15748-49, 15755; 110 Daily Cong. Rec. 373, 375-377 (January 14, 1964).

> reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations *including landing and take-off of aircraft.* [Emphasis supplied.]

As explained by Senator Monroney, Chairman of the Aviation Subcommittee of the Senate Commerce Committee, in requiring assurance of compatible land use by zoning, "the goal is to improve our existing airports, build new airports, and promote safety" (109 Cong. Rec. 15755); it is designed to preclude intrusions by which "airports can be ruined by the construction of high-rise apartments, smokestacks, and similar buildings which encroach on the flight patterns" (*id.* at 15749); and the dominant consideration in zoning is the "safety effect", "safety must take preeminence on any determination."[16] The FAA Administrator similarly stated that in the future administration of the requirement to take appropriate zoning action, as in all matters, "our emphasis is always primarily on safety."[17] And the CAB Chairman observed that "to restrict the use of land adjacent to an airport so as to make it compatible with the operation of the airport should tend to insure greater safety in the operation of aircraft and more comfortable living in areas adjacent to airports."[18]

Legislative endorsement by Congress in 1964 of "adoption of zoning laws" to assure land use compatible with airport operation confirms the actual long-

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[16] Hearings before the Aviation Subcommittee of the Senate Commerce Committee on S. 1153, 88th Cong., 1st Sess., 154.

[17] *Id.* at 22.

[18] *Id.* at 28.

standing practice. The airport approach standards, measuring the air space in the vicinity of the airport which should be free of obstructions to maintain safe take-off and landing, are prescribed by the FAA in Technical Standard Order No. N18 (TSO-N18), dated April 26, 1950, as amended, entitled "Criteria For Determining Obstructions To Air Navigation." In general, with the approximate center of the airport as the reference point and fanning from it at increasingly ascending elevations, the air space at and surrounding the airport is divided into four surfaces with different dimensions and height limits appropriate to the function of each, all designed to provide hazard-free maneuvering space for the landing and take-off of aircraft.[19] For maximum safety no object should penetrate the air space above the prescribed height limitations. And, in determining the needs of aircraft, "it is obviously necessary, in a matter so deeply affecting safety, to provide some general reserve of excess maneuvering space."[20] The normal flight path of aircraft does not abut the defined height limits. "It is significant to note that aircraft are not flown along these imaginary surfaces but are operated above and within the areas protected."[21]

To secure adherence to the airport approach standards prescribed by the FAA, the "adoption and enforcement of zoning regulations" is one of the means

[19] We have not found it possible to compress TSO-N18 in a short compass with accuracy. It appears in full in Appendix D, *infra*, pp. 15a-21a. A nontechnical description of TSO-N18 prepared by FAA personnel appears in Appendix E, *infra*, pp. 23a-27a.

[20] CAA, Airport Survey, H. Doc. No. 245, 76th Cong., 1st Sess., 65 (1939). And see, *id.* at 63-71.

[21] Appendix E, *infra*, p. 26a.

specifically enumerated in the FAA's standard form project application to which the sponsor must subscribe (Form FAA-1624, Part III 7, Sponsor Assurances):

> Insofar as it is within its power and reasonably possible, the Sponsor will, either by the acquisition and retention of easements or other interests in or rights for the use of land or airspace *or by the adoption and enforcement of zoning regulations,* prevent the construction, erection, alteration, or growth of any structure, tree or other object in the approach areas of the runways of the Airport, which would constitute an obstruction to air navigation according to the criteria or standards prescribed in Section A of FAA Technical Standard Order No. N18, dated April 26, 1950, as amended. [Emphasis supplied.]

Furthermore, the FAA authors a Model Airport Zoning Ordinance (Appendix F, *infra*, pp. 27a-47a). In the foreword to the model ordinance, the FAA notes that attached to it is "a copy of Technical Standard Order-N18, which sets forth criteria for determining obstructions to air navigation" (*infra*, pp. 27a-28a). It further observes that, in establishing and defining by ordinance the "various zones required for the protection of the airport from the encroachment of obstructions or hazards to aircraft", the "size of these zones at each airport should be based on the standards established for the type of the airport by TSO-N18" (*infra*, p. 28a). And it advises that its personnel is available to guide in the application of the standards (*ibid.*):

> The Airports Branches of the several Regional Offices of the Federal Aviation Agency and the District Airport Engineers are available to assist

> in developing airport zoning regulations through advice as to the application of the criteria of TSO-N18 to the particular airport and the desired approach protection.

Even with respect to the "runway clear zone," described as "the innermost part of the runway approach area" (14 CFR § 151.9(h)), zoning in lieu of a property interest may be relied upon in the case of "existing airports where improvements are made to runways or landing strips" (*id.* § 151.11(d)) or "where substantial improvements are made that do not benefit a specific runway or landing strip" (*id.* § 151.11(e)), the applicable FAA regulation stating that (*id.* § 151.11(f)):

> If a sponsor or other public agency shows that it is legally able to prevent the future erection or creation of obstructions in the runway clear zone area, and adopts protective measures to prohibit their future erection or creation, that showing is acceptable for the purposes of paragraphs (d) and (e) of this section in place of an adequate property interest. . . . In each case, the sponsor must furnish information as to the specific height limitations established and as to the current and foreseeable future use of the property to which they apply. The information must include an acceptable legal opinion of the validity of the measures adopted, including a conclusion that the height limitations are not unreasonable in view of current and foreseeable future use of the property, and are a reasonable exercise of the police power, together with the reasons or basis supporting the opinion.

Congressional confirmation and FAA practice are rooted in studies advocating airport zoning to protect aerial approaches. In the pioneer study in 1930, the

United States Department of Commerce, Aeronautics Branch, recommended that "municipalities and other political subdivisions . . . exercise the police power in the promulgation of properly coordinated zoning ordinances applying equitably to public airports and intermediate landing fields and to commercial airports of the public utility class, as well as other land uses."[22] In 1939, the Civil Aeronautics Authority reported that "zoning . . . is the simplest solution . . . and therefore the most satisfactory way that can be adopted" to prevent obstructions to aerial approaches, observing in addition that "it is part of the essential fact of the present status of the American airport system that the possibility of safe and efficient use of an airport is entirely dependent on its surroundings. . . ."[23] The so-called "Doolittle Report" to the President in 1952 made "two suggestions" pertaining to aerial approaches: "(1) that certain extensions or over-run areas be incorporated in the airport itself, and (2) that larger areas beyond such extensions be zoned by proper authority, not only to prevent the erection of obstructions that might be harmful to aircraft, but also to control the erection of public and residential buildings as a protection from nuisance and hazard to people on the ground."[24] And the House Committee on Interstate and Foreign Commerce has warned that: "Hundreds of millions of dollars are being spent on airports. But unless an airport can be approached

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[22] Report of the Committee on Airport Zoning and Eminent Domain, December 18, 1930, p. 9.

[23] CAA, Airport Survey, H. Doc. No. 245, 76th Cong., 1st Sess., 33, 34 (1939).

[24] Report of the President's Airport Commission, The Airport and Its Neighbors, 7 (May 16, 1952).

without encountering obstructions the investment therein becomes valueless—or the airport itself becomes a death trap. To protect passengers and flight crews, and to assure that airports can be used in connection with defense of the Nation in time of emergency, it is vital that there be adequate zoning. Unless zoning is accomplished now, before airport approaches are further obstructed, the task will some day reach staggering proportions. Few steps are of such urgency. Few steps are so essential to promote safety."[25]

The indispensability of airport zoning to assurance of safety to persons in the air and on the ground is patent. "The maintenance of an adequate airport system is the single most important factor in insuring air safety. The importance of adequate airport facilities was cogently demonstrated in testimony presented by the Federal Aviation Agency. The agency, in urging continuation of the program, observed that more than two-thirds of all aircraft accidents occur either at or within 5 miles of the airport."[26] "The possibility of an aircraft crashing into one's home is greatest in the narrow, elongated strip of land that underlies the approach zone to runways on airports. Commercial (air carrier) and military planes that have caused death or injury to persons on the ground near airports have,

[25] H. Rep. No. 784, 78th Cong., 1st Sess., 11 (1943). See also, Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, 11 Law & Contemp. Prob. 539, 542 (1946); 2 Yokley, Zoning Law and Practice, 43-45, 61-75 (1953).

[26] S. Rep. No. 446, 88th Cong., 1st Sess., 19 (1963). See also, Hearings before the Aviation Subcommittee of the Senate Commerce Committee on S. 1153, 88th Cong., 1st Sess., 29, 184; Statistical Review and Resume of Accidents, US Air Carriers, Calendar Year 1960, CAB 1963, 12

in most cases, struck close to the projection of the centerline of the runway and within the approach zone. . . ."[27] "Many accidents to airplanes occur while taking off or landing and one of the greatest single factors to insure safety of air travel today and in the future is that of clearing and keeping clear approaches to airports."[28] "In the exhaustive investigations of the select committee of this House to investigate air accidents and in the inquiries by this committee this year and previously, one of the principal problems in connection with the promotion of safety in air navigation was found to be the matter of regulating the height and location of structures on and in the vicinity of airports."[29]

Airport zoning thus fulfills the need of providing unobstructed air space essential to safety. By the same token it protects the investment in airports. Money spent on an airport later made partly or wholly useless by encroachments on the air space necessary to its safe operation is money partly or wholly wasted. The investment which it is important to safeguard is immense. "Since the federal aid to airport program was first initiated in fiscal year 1947, total expenditures have amounted to $550,939,855."[30] Estimated cost of further development over the next five years is $1,082,439,000 of public funds,[31] with the federal grant-

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[27] Report of the President's Airport Commission, The Airport and Its Neighbors, 21 (May 1952).

[28] Molloy and Rhyne, Airports and Airplanes—Some Legal Problems They Create For Cities, NIMLO Report No. 42, 7 (Apr. 1944).

[29] H. Rep. No. 754, 79th Cong., 1st Sess., 11 (1945).

[30] S. Rep. No. 445, 83d Cong., 1st Sess., 7 (1953).

[31] National Airport Plan, Requirements for Fiscal Years 1963, 1967, 1963 Supplement, FAA, Ex. [illegible], 73 (Mar. 1962).

in-aid program providing for $225,000,000 over the next three years.[32]

Airport zoning is therefore imperative if the two-fold purpose of maximizing safety and protecting investment is to be adequately served. It is no answer to say that the same end can be accomplished by the acquisition of sufficient property interests. For that is a practical impossibility. "Purchase or condemnation by eminent domain proceedings of all land upon which hazards to the use of aircraft may be created is financially impossible in nearly all cases."[33] "The cost of acquisition of sufficient land . . . is frequently beyond the capabilities of a single community."[34] "To purchase outright enough land to make the protection complete would often require that the acreage needed for the landing area proper be multiplied by five or more. . . ."[35] At the Senate Hearings on the 1964 amendments to the Federal Airport Act one knowledgeable person noted that "General Kuhfeld, in a statement he made before the House Interstate and Foreign Commerce Committee, I believe, stated the Air Force conducted a survey to determine the cost of purchasing land around the Air Force installations, and, of course, many times they are farther from the city than the commercial airports, and it would cost something like $6 billion for cities and counties across the country. I can get the exact figures for the committee. But

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[32] Public Law 88-280, § 4, March 11, 1964

[33] Rhyne, Airports and the Courts, 165 (1944).

[34] Report of the President's Airport Commission, The Airport and Its Neighbors, 8 (May 1, 1952)

[35] CAA, Airport Survey, H. Doc. No. 247, 75th Cong., 1st Sess., p. 7986

cities and counties don't have anything like that amount of money to purchase this property around airports."[36] Airport zoning is the alternative that Congress has confirmed and to which local government has resorted. Senator Monroney explained that by requiring assurance of recourse to zoning "the goal is to improve our existing airports, build new airports, and promote safety—*not price our airports out of existence.*"[37] As the Senate Commerce Committee put it, "the committee has no intention of allowing airports to be priced out of existence."[38]

The factors of safety and investment underscore the communal importance of airports and the contribution to the general welfare which airport zoning makes. "Airports are not just local assets. They do not just benefit the larger airlines, the private and business pilots and the air travelers, but vitally affect the prosperity, well-being and security of all our citizens."[39] Very early, in 1928, Mr. Justice Cardozo presciently observed that:[40]

> Aviation is today an established method of transportation. The future, even the near future will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition. Chalcedon was called the city of the blind, because its founders rejected the noble site

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[36] D. C. Ward, General Counsel, National Association of Counties, in Hearings before the Aviation Subcommittee of the Senate Commerce Committee on S. 1153, 88th Cong., 1st Sess., 82.

[37] 109 Cong. Rec. 15755 (emphasis supplied).

[38] S. Rep. No. 446, 88th Cong., 1st Sess., 24 (1963).

[39] *Id.* at 17.

[40] *Hesse v. Rath*, 249 N.Y. 436, 164 N.E. 342.

> of Byzantium lying at their feet. The need for the vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness.

"Aviation has added a new dimension to travel and to our ideas."[41] "An airport or safe landing field is a vital and indispensable link in this system of transportation. Our modern airports render a public service similar to other governmental functions which promote the health, comfort and safety of the people and the general welfare of our State and Nation."[42]

In this case, the situation of the Gary Municipal Airport precisely fits the federal pattern of municipal development within the aegis of the national system. It is one of the airports which make up the National Airport Plan; it serves the communities of Gary, Hammond, and East Chicago; and improvements in it to meet civil aviation needs for fiscal years 1963-1967 are considered necessary by the National Airport Plan.[43] The grant agreement between the City of Gary and the Civil Aeronautics Administration obligates Gary as the sponsor to prevent insofar as it can land use in or out of the airport boundaries which would create air hazards, and stipulates "the adoption and enforcement of a zoning ordinance and regulations" as one of the means to that end (Appendix I, *infra*, p. 71a):

> Insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any

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[41] Mr. Justice Jackson, concurring in *Northwest Airlines v. Minnesota*, 322 U.S. 292, 302.

[42] *Seaboard Air Line R. Co. v. Peters*, 43 So. 2d 448, 453 (Fla.

[43] National Airport Plan, Requirements for Fiscal Years 1963-1967, FAA, 101 (April 1962).

> land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, taking-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either *by the adoption and enforcement of a zoning ordinance and regulations* or by the acquisition of easements or other interests in lands or airspace, or by both such methods. . . . The airport approach standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946 unless otherwise authorized by the Administrator. [Emphasis supplied.][44]

The zoning ordinance which Gary adopted in September 1949 was tailored from the then current model ordinance which the Civil Aeronautics Administration had authored in February 1947 (Appendix G. *infra*, pp. 49a-60a). The height limits and zones it prescribed were taken directly from the federal criteria then prevailing (Appendix H. *infra*, p. 61a). And the federal interest is particularly apparent in that the land on which the airport is constructed was donated by the United States "for the benefit which shall accrue to the United States . . . from the continued use of such

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[44] Office of Airports Drawing No. 672 was superseded by Office of Airports Drawing No. 814, the latter being incorporated in the presently effective Technical Standard Order N18 as the schematic representation of the obstruction criteria. The Grant Agreement between the City of Gary and the Civil Aeronautics Administration of June 19, 1951, states in paragraph 8(b) that "The Airport Approach Standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 814 dated April 26, 1950 unless [otherwise] authorized by the Administrator".

property as an airport", with automatic reversion of the title to the United States if the FAA Administrator determines that "the premises have ceased to be used or are necessary for airport purposes" (*supra*, p. 3).

Not only is the Gary Municipal Airport part of the national system of public airports and the Gary zoning ordinance a reflection of federal planning, but Indiana itself has expressed a state-wide concern for protecting local airports by zoning. There are 63 airports in Indiana included within the National Airport Plan.[45] In 1957 Indiana enacted a statute known colloquially as the Tall Structures Act and formally entitled "An act to promote safety, welfare and protection of persons and property in the air and on the ground by regulating the height, location and visual identification characteristics of certain structures." 5 Burns Ind. Stat. 14-327 *et seq.* The Act is designed to apply only where no existing airport zoning already obtains, for it is "not [to] apply in any instance where the proposed erection, addition to or replacement of a structure is located in an area for which airport zoning regulations have been adopted pursuant to law. . . ." *Id.* 14-339. The policy underlying this void-filling statute is expressed as follows: "The safety, welfare and protection of persons and property in the air and on the ground and of the maintenance of electronic communication within this state requires that the navigable airspace overlying the state and the approaches to and the air traffic pattern of any public use airport in this state be maintained in a reasonably unobstructed con-

[45] National Airport Plan, Requirements for Fiscal Years 1963-1967, FAA, 99-102 (April 1962); *Id.*, 1963 Supplement, 38-39 (March 1963).

dition for the safe flight of aircraft. To that end, the location and height of structures and the use of land related thereto, is regulated." *Id.* 14-327. The scheme of regulation is to prohibit the erection of structures which exceed specified height limitations unless a permit is obtained (*id.* 14-329); to prohibit the issuance of a permit if certain defined height limitations are exceeded (*id.* 14-330); and, within permissible height limitations, to base the issuance of a permit upon a determination by the Indiana Aeronautics Commission of "a location and height for a structure for the particular purpose proposed in the location proposed as will best serve the safety and welfare of persons and property in the air and on the ground and other technical and economic factors involved. In considering and disposing of the application the safety and welfare of persons and property in the air and on the ground shall be deemed paramount to economic and technical factors." (*id.* 14-333).

The protection of the Gary Municipal Airport by zoning thus typifies the union of federal, state and local authority in resorting to this means of regulating land use adjacent to airports for the purpose of maintaining unobstructed aerial approaches. It is within this framework of uniform recognition of the need by those who bear the responsibility of government that it is necessary to consider whether the Fourteenth Amendment stands athwart the airport to paralyze regulatory viability by withholding the power to zone adjacent property to assure compatible land use.

B. Airport Zoning Is A Constitutional Means Of Regulating Land Use Of Property Adjacent To An Airport.

Hazard-free air space surrounding the airport to provide maneuvering room for the take-off and landing of aircraft is essential to safe and efficient operation. This is datum. Zoning the property adjacent to the airport to maintain unobstructed approaches fulfills the need of preserving access but at the same time diminishes the use to which the adjacent property can be put. Lessened use is of course inherent in regulation and does not by itself constitute a taking. "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every change in the general law." *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 413. The point at which diminution reaches a magnitude constituting a taking is a question of degree. *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155, 168. "There is no set formula to determine where regulation ends and taking begins." *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 594.

But to say that the question is one of degree does not mean that it is wholly at large. Zoning is indispensable in our crowded society as a means of adjusting conflicting property and community demands. Space, height, and use limitations are commonplace and their validity unquestionable (*Gorieb* v. *Fox,* 274 U.S. 603, 608):

> It is hard to see any controlling difference between regulations which require the lot owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and a regulation which requires him to set his building a reasonable distance back from the street. Each interferes in the same way, if not

> to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. . . . State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.

Airport zoning is in principle no different. In endorsing it as a valid exercise of the police power, the Florida Supreme Court observed that: "We can think of no situation which more clearly authorizes the exercise of this phase of the police power than that involved here. Such regulations not only promote the general welfare of the state and community served but contribute to the proper and orderly development of land areas in the vicinity of airports. Such regulations stabilize values and provide safety to those who use facilities in taking off and landing as well as those living in the vicinity thereof. . . . [W]ell settled principles . . . with reference to . . . zoning apply equally to airport zoning." *Harrell's Candy Kitchen, Inc.* v. *Sarasota-Manatee Airport Authority*, 111 So. 2d 439, 443 (Fla.). In reaching this conclusion, the court noted that the "airport zoning regulations" before it "conform in all details to the airport approach standards compiled by the Civil Aeronautics Administration of the United States. These standards are the result of many years of experience by the outstanding ex-

perts in the field of aviation and a compliance therewith is a condition precedent to federal aid in airport construction." *Id.* at 444-445. The court therefore upheld an injunction against the erection of a structure which was 13.36 feet in excess of the permissible height limit of 27.64 feet.[46]

The Alabama Supreme Court has similarly sustained the validity of airport zoning. *Baggett* v. *City of Montgomery*, 160 S. 2d 6 (Ala.). The city of Montgomery enacted a zoning ordinance embracing "all land within a radius of two miles of the airport" (*id.* at 7). The ordinance limited the use of designated land to "agricultural uses, horticulture, one-family residences, and flying fields"; it restricted lots for residential purposes to certain sizes; it prohibited apartments and duplex houses; and within a designated district it provided that "no structure or tree shall exceed two and one-half stories or thirty-five (35) feet in height . . ." (*ibid.*). The policy underlying the ordinance was expressed in virtually the same terms as the Gary ordinance (*id.* at 8). And provision for variance was made in virtually the same terms as the Gary ordinance (*id.* at 9). The court held that the ordinance had a valid scope for operation on its face and that it could not therefore be illegalized because of anticipated arbitrary application in particular circumstances. Said the court (*id.* at 8):

> In the light of the provisions of the Airport Zoning Act, it occurs to us that the city was empowered to adopt an ordinance containing as it did

[46] See also, *Waring* v. *Peterson*, 137 So. 2d 268 (Fla. Ct. App.), validating an airport zoning ordinance which in part prescribes a 30 foot height limitation in the aircraft approach zones at the end of the runways.

> a blanket or uniform restriction as to height applicable to the entire area embraced within the ordinance, and also to limit as it did the types of structures that could be erected in such area. This they could do, provided the restrictions were in whole or in part reasonably related to all or part of the area embraced in the ordinance. Unless all of the restrictions had no reasonable or fair application to any part of the area, we would not be justified in striking down the ordinance as an arbitrary and unreasonable usurpation of the police power. We must keep in mind the protection against airport hazards that the legislature had in view as expressed in the Airport Zoning Act.

The court further observed that the provision for variance, and the adequate hearing procedure in conjunction with it, sufficiently safeguarded against arbitrariness (*id.* at 8-9).[47]

And informed commentators have likewise uniformly held the view that reasonable airport zoning is valid.[48]

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[47] Other cases pro and con, whether by holding, dictum, or implication, are in general not illuminating, and are collected in Rhyne, Municipal Law, 490 (1957), and Anno., 77 A.L.R. 2d 1355, 1362-64. See also, for decisions adverse to airport zoning, *Roark* v. *City of Caldwell* 33 U.S. Law Week 2089 (Idaho S. Ct., July 30, 1964); *Sneed* v. *County of Riverside*, 219 ACA 221, 32 Cal. Rep. 318.

[48] Strunck, *Airport Zoning And Its Future*, 50 ABAJ 345 (April 1964); Rhyne, Municipal Law, 491 (1957); Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, 11 Law & Contemp. Prob. 539, 554 (1946); Rhyne, Airports and the Courts, 164-190 (1944); Note, *Zoning—The Airport And The Land Surrounding It In The Jet Age*, 48 Ky L.J. 273 (1960); Manion, Law of the Air, 77 (1950); McIntire and Rhyne, Airports and Airplanes and the Legal Problems They Create for Cities, NIMLO Report No. 42, 14-19 (April 1949); Smylie, *Constitutionality of Federal Airport Zoning*, 12 Geo. Wash. L. Rev. 1, 25-30 (1943).

Accordingly, unless airport zoning is to be *a priori* nullified as beyond any legitimate exercise of the police power, the question reduces to whether the ordinance in this case is on its face so wanting in "reasonableness" (*Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-595) that it is "wholly void" (R. 217). There is no claim or showing that the height limitations the ordinance prescribes are not strictly germane to preserving unobstructed approaches to the airport and essential to maintaining safe flight. They precisely conform indeed to the airport approach standards which had been promulgated by the Civil Aeronautics Administration when the ordinance was enacted (Appendix H, *infra*, p. 61a). At the same time that safe access to the airport is assured, the interest of the adjacent property owner is carefully accommodated. The ordinance exempts from its operation existing structures and those which can with diligence be completed within two years of enactment. Current use of property is therefore wholly undisturbed. Nor is future use of property restricted by the ordinance if good cause for variance is shown. And a full hearing procedure is established.

The provision for variance contained in the ordinance bears special stress. In this case respondent acquired the adjacent property years after the ordinance was enacted and therefore with full notice of the limitations on its use. Yet it made no effort to seek a variance, thus foregoing the opportunity to show superior equity in its proposed use of the adjacent property. By this failure respondent precluded itself from asserting anything but the invalidity of the ordinance on its face in the abstract. For while a zoning ordinance like any legislation impeccable on its face may be arbi-

trarily applied, there can be no claim of specific arbitrary application without first having sought a variance essential to the determination of the ultimate incidence of the ordinance. Cf., *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395-397. Until a variance is sought and refused the actual application of the ordinance is unknown and unknowable. Requiring that a variance be sought is therefore more than the customary obligation to exhaust administrative remedies as a matter of procedural propriety. *Cf., Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49-52. More fundamentally, the specific substantive impact of the ordinance cannot be ascertained until the procedure for variance has been invoked and completed. If the variance is granted, the matter ends. This eventuality emphasizes that, if "an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued." *Public Utilities Com.* v. *United States*, 355 U.S. 534, 539-540. And since there can be no assumption that a variance which should be granted will be withheld, one who "has failed to make the required application . . . is not at liberty to complain because of his anticipation of improper or invalid action in administration." *Smith* v. *Cahoon*, 283 U.S. 553, 562. Finally, the question whether in application a particular limitation upon the use of property constitutes regulation or a taking, involving as it does nice considerations of degree and balance, "turns almost wholly upon the facts to be found"; therefore, the forum created by the legislation to try the issue whether the limitation should be maintained or lifted is clearly the most appropriate to conduct the inquiry initially and therefore recourse to it is obligatory. *Cf., Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 228-232. See also, *Laurel Hill Cemetery* v. *City*

of San Francisco, 216 U.S. 358, 364-365. The upshot is that the provision for variance is a built-in safeguard against arbitrary application which distinctively contributes to the validity of the ordinance on its face and precludes any claim of arbitrary application in the absence of recourse to it.

A further factor serving to validate the ordinance on its face is the "inverse condemnation" procedure which Indiana law establishes. As part of its statutory procedure for the assessment of damages in eminent domain proceedings, Indiana provides that "Any person having an interest in any land which has heretofore been or may hereafter be taken for any public use without having been first appropriated under this or any prior law may proceed to have his damages assessed under this act, substantially in the manner herein provided." 2 Burns, Ind. Stat. 3-1711 (1946 Repl.). This provides a remedy against an uncompensated taking by the bringing of an "inverse condemnation" action. "Inverse condemnation is the popular description of an action brought against a governmental entity having the power of eminent domain to recover the value of property which has been appropriated in fact, but with no formal exercise of the power." *Martin* v. *Port of Seattle*, 391 P. 2d 540, 542, n. 1 (Wash.). Accordingly, if a variance has been sought and refused, and a limitation placed upon the use of property by the ordinance is later judicially found to be a taking, compensation is obtainable via inverse condemnation. Thus, coupling the ordinance with the state statutory procedure for inverse condemnation, a constitutionally invulnerable method of controlling land use is established. Regulation under the police

power holds sway until the point of taking is reached and then compensation is provided.[49]

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[49] The court below concludes, however, that compensation via inverse condemnation is irrelevant because the ordinance is "wholly void" (R. 217). But one element in determining whether or not the ordinance is "wholly void" is the availability of compensation. In reality, therefore, the court below concludes that the ordinance is unconstitutional by disregarding that which serves to make it constitutional. The vice in the approach of the court below is glaringly revealed by its identical disposition of the relevance of the procedure for variance. It states that: "True, the ordinance provided that an aggrieved land-owner might apply for a variance, but there is no provision for compensation in event recourse to such procedure is unsuccessful. In any event, a variance need not be sought under the rule requiring exhaustion of administrative remedies when a zoning ordinance is invalid as an entirety" (R. 214). But there was provision for compensation via inverse condemnation which the court below chose to ignore. And to conclude that the ordinance "is invalid as an entirety", and for that reason no account need be given to the provision for variance, is to have made a judgment of unconstitutionality in isolation from an important element germane to showing constitutionality.

The other reason advanced by the court below for disregarding inverse condemnation is simply illogical. It states that: "In this case there had not been any actual encroachment upon or taking of the air space over the land in question within the area specified by the ordinance. This was impossible, because the power lines which are adjacent to, parallel with, are much higher than the toll road complained of" (R. 216-217). But the court below had earlier found a taking—indeed, this was the whole basis of its decision—in the limitation upon the height of structures imposed by the ordinance at the place of the toll road construction. Thus, to hold the ordinance unconstitutional, the court below found a taking without compensation, and to deny the availability of compensation, it found that there was no taking! The reference to the power lines (the catenary system) is in any event besides the point. As shown (*supra*, p. 9), the catenary system was a nonconforming use which preexisted the ordinance, and negotiations to lower it had been in progress but were terminated as futile when the toll road was built. For the toll road became the permanent limiting obstruction which constituted the effective bar to access, unlike the other removable obstruction.

The total abstractness of the attack upon the validity of the ordinance on its face is emphasized by the particular circumstances of the toll road construction. As shown (*supra,* p 7), the Grand Calumet River divides the south boundary of the airport property from the north boundary of the toll road property. The river is the boundary. The land immediately south of the airport is marsh. The toll road was not simply built on the river edge of the property line. It was in fact constructed partly on the river bed itself. The toll road shifted the river bed north a distance varying from 100 to 175 feet. At the point that the toll road intersected the aerial approach to the north-south runway, the north line of the river bed was moved over the south line of the airport property by 175 feet, approximately the width of the river. And the toll road was not built on the surface of the land. It was elevated about 30 feet above the surface of the land.

To construct a toll road partly on the river bed, to shift the river bed the width of the river across the edge of an existing property line, and to elevate the road about 30 feet above the surface on which it is built is surely land use which can be constitutionally regulated. To limit the height of a structure at that point is even less demanding than an ordinary setback requirement from a lot line which totally bars any construction within the defined area. Although the record is totally silent on the subject, presumably the toll road was built at the place and height considered to be the most convenient for its construction. There is, however, not a snip of a suggestion—again the record is totally silent—that it had to be built in that very place and at that very height or not at all, or that a shorter height and a more southerly route

could not have been proportioned to each other to comply with the ordinance and suit the road about as well. And the assumed maximum convenience in constructing the toll road could be served only by distinctly disserving the essential need of the airport. But the ordinance had intervened to strike the balance of convenience in favor of the airport, subject to reevaluation in a proceeding to secure a variance. This is the essence of regulation. It can be judicially undone only if it is devoid of rationality. That cannot possibly be said of the adjustment the ordinance encases. Toll road construction is not bucolic land use. This is no dirt road on the surface of the land used by a farmer to carry his milk to the dairy or his grain to the barn.

Nothing in *United States* v. *Causby*, 328 U.S. 256, nor *Griggs* v. *Alleghany County*, 369 U.S. 84, upon which much reliance is mistakenly placed, supports the view that an airport zoning ordinance is void on its face because it prescribes height limitations on the use of property surrounding the airport. *Causby* and *Griggs* hold that low flights at frequent intervals which significantly diminish the use of property lying below the aircrafts' path result in a taking which requires compensation. These decisions do not reach the question whether the police power is exercisable to zone property adjacent to the airport to prevent future development of land use incompatible with safe and efficient airport operation. The problems are discrete and their resolution not antagonistic. Airport zoning deals with interference with landing and take-off of aircraft caused by structures too high for safe operation. *Causby* and *Griggs* deal with interference with surface use of land caused by low-flying aircraft. Thus, a structure may not be erected in excess of a prescribed

height limit—that is airport zoning. Below that height limit structures may be freely built, and whoever is responsible for flying aircraft so low and so often over such structures as substantially to destroy their utility is liable for payment for the taking—that is *Causby* and *Griggs*. Put another way, airport zoning still allows ample land use below the defined height limits, and *Causby* and *Griggs* protect such land use by their holding that low and frequent flights drastically impairing utilization of the property work a compensable taking. In short, airport zoning regulates the upward reach of structures; *Causby* and *Griggs* place limitations on the uncontrolled downward reach of aircraft. To say that aircraft cannot be flown so low and so often over terrain without taking an easement requiring compensation does not mean that the Constitution licenses the erection of structures so high as to impair safe and efficient flight.

In this case all that is presented is excessive height of structures. There is not a word in this record concerning low and frequent aircraft flights, and therefore no possible predicate for invoking *Causby* and *Griggs*. It cannot be assumed that to make air space hazard-free by zoning automatically results in a burdensome incidence of low and frequent flight through that air space. Traffic may be heavy or light, or high or low, or interfere or not with enjoyment of the land below. The condition one way or another cannot be supposed. For example, aircraft passing over the toll road in a north-south direction can hardly be presumed to interfere with auto traffic speeding in an east-west direction on the road below. Should excessive and interfering air use develop it can be dealt with when it happens. To prevent oppressive land use by zoning does not of

itself cause or countenance oppressive air use reached by *Causby* and *Griggs*.

Invalidation of the ordinance thus rests on the bare premise that ownership of the property of itself precludes zoning to regulate its use. It is this proposition which is the sole ground upon which the court below bases its holding that the ordinance is a "wholly void" enactment "invalid as an entirety" (R. 214, 217). According to it, " 'Had the . . . [adjacent property owner] chosen to erect flagpoles, factory chimneys, or tall buildings across the whole of its land, and several times as high as its power line, it was within its rights notwithstanding it might have entirely prevented the landing of airplanes at . . . [the] airport' " (R. 212). This thesis is diametrically opposed to that on which Congress acted when it confirmed recourse to airport zoning as a central element of federal aviation policy (*supra*, pp. 25-26). For Congress endorsed zoning for the very reason that it was designed to prevent airports from being "ruined by the construction of high-rise apartments, smokestacks, and similar buildings which encroach on the flight patterns" (109 Cong. Rec. 15749). The court below is deceived by an ancient fallacy. "'The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed.' *Block* v. *Hirsch*, 256 U.S. 135, 155. But rights in property are not immutable. "Such words as 'right' are a constant solicitation to fallacy." *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31. "Ownership does not always mean absolute dominion." *Marsh* v. *Alabama*, 326 U.S. 501, 506. The "extent to which legislation may modify and restrict the use of property consistently with the Constitution

is not a question for pure abstract theory alone." *Laurel Hill Cemetery* v. *City of San Francisco*, 216 U.S. 358, 366. "Practical lines have to be drawn, and distinctions of degree must be made." *Diamond Glue Co.* v. *United States Glue Co.*, 187 U.S. 611, 616. "The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights." *Queenside Hills Realty Co.* v. *Saxl*, 328 U.S. 80, 83. The essence of civilized society is adjustment of competing demands in the use of land and other valuables. This is the traditional function of zoning and airport zoning is no different. The absolutism of the court below is atavistic. *Ferguson* v. *Skrupa*, 372 U.S. 726, and requires rejection in order to maintain governmental viability in assuring through zoning compatible land use between the airport and its neighbors for the good of the community, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 303. The judgment below condemns the ordinance as "void, root and branch. That judgment must be reversed." *Block* v. *Hirsch*, 256 U.S. 135, 158.

II. THE DECISION BELOW DOES NOT REST UPON AN INDEPENDENT AND ADEQUATE STATE GROUND.

The decision below does not rest upon a "'nonfederal ground . . . independent of the federal ground and adequate to support the judgment.'" *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 281. While respondent contended that the ordinance violated both the state and federal constitutions (R. 56, 210), and the court below quoted the relevant provisions of both in a footnote in its opinion (R. 211, n. 1), at every critical juncture of its analysis the court below invoked and quoted this Court's decisions as the foundation of its reasoning (*supra*, p. 11), and at no stage did it

specify the state constitution as the grounding for its ultimate conclusion that "the ordinance purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation" (R. 216). The federal source of law underpinning the decision below is especially denoted by its prominent reliance on *United States* v. *Causby*, 328 U.S. 256, and *Griggs* v. *Allegheny County*, 369 U.S. 84 (R. 212-213). *Causby* and *Griggs* importantly construed the Federal Constitution, the Civil Aeronautics Act, the Federal Airport Act, and federal regulations. And the inherently federal character of any question of the constitutionality of airport zoning is further apparent from the fact that full account of federal aviation policy is essential to its informed determination.

It was thus by force of this Court's decisions, and the federal constraint exerted by them, that the decision below was reached. Without the influence of necessary obedience to this Court's views, there is no saying that the court below would have arrived at the result it did. For it would be pointless for it to conclude that the ordinance was valid under the state constitution if it must in any event fall under the federal constitution. And there is no suggestion that the state constitution, which has identity of scope with the federal constitution, has been given a different construction. *Cf., Minnesota* v. *National Tea Co.*, 309 U.S. 551, 556-557. Since the premises for the decision below are derived from the compulsion of this Court's opinions, its federal orientation precludes ascribing to that decision an *independent* state basis. Hence, giving maximum weight to the possible existence of a state ground, it is inextricably entwined with the

federal ground, and the least that must therefore be said is that the "two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the State law." *State Tax Commission* v. *Van Cott,* 306 U.S. 511, 514. In that posture, "where the non-Federal ground is so interwoven with the other as not to be an independent matter, . . . our jurisdiction is plain." *Enterprise Irr. District* v. *Farmers Mut. Canal Co.,* 243 U.S. 157, 164. See also, *Abie State Bank* v. *Bryan,* 282 U.S. 765, 773. At the minimum, assuming there is room at all for autonomous state decision free of federal law, since the court below "held as it did because it felt under the compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion." *Missouri* v. *Mayfield,* 340 U.S. 1, 5. See also, *Perkins* v. *Benguet Consolidated Mining Co.,* 342 U. S.437, 443, 448-449; *Rayonier, Inc.* v. *United States,* 352 U.S. 315, 320-321.

There cannot in any event be a state decision of the constitutional question which can be validly reached free of federal law. A state ground for decision must be both independent and adequate.[50] In this case, if there were an existing state ground which could be deemed an independent basis of decision, it would not qualify, as it must, under the twin requirement that it be an *adequate* predicate for the judgment. The federal scheme which the Federal Airport Act embodies is based on the necessity of recourse to airport zoning as a governmental means of regulating land use adjacent to airports for the purpose of maintaining unobstructed aerial approaches. The total

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[50] *Fay* v. *Noia,* 372 U.S. 391, 428-430.

nullification of airport zoning worked by the decision below is wholly incompatible with the federal scheme. Accordingly, the consequence of a conclusion that the ordinance had been invalidated upon an independent state constitutional ground would be to bring the decision below into collision with federal aviation policy expressed in the Federal Airport Act and to require its supersession under the Supremacy Clause. "[I]t is 'familiar doctrine' that the federal policy 'may not be set at nought, or its benefits denied,' by the state law." *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 229.[51]

The court below faced the relevance of federal aviation policy when it concluded, albeit erroneously, that the "federal government has recognized the requirement that easements for the glide angle needed for landing and take-off must be acquired by condemnation proceedings and payment of just compensation" (R. 216). Respondent had indeed urged in the court below that its claim of unconstitutionality was compatible with federal aviation policy.[52] There is, therefore, no escape from the federal question. It would be an odd sort of *adequate* state ground, *sufficient* to sustain the judgment, which at once founders on the Supremacy Clause.

To illustrate concretely, the inevitable consequence of the decision below is to restrict the means available to protect aerial approaches to acquisition of property

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[51] See also, *Pennsylvania* v. *Nelson*, 350 U.S. 497; *Hill* v. *Florida*, 325 U.S. 538; *Cohens* v. *Virginia*, 6 Wheat. 264, 414 ("The constitution and laws of a state, so far as they are repugnant to the constitution and laws of the United States, are absolutely void.").

[52] Respondent's brief in the court below, p. 242. All briefs below have been certified by the clerk of the Indiana Supreme Court and lodged with the clerk of this Court.

interests by purchase or condemnation. That means is financially prohibitive. The "adoption of zoning laws" which Congress has only this year explicity confirmed as a central element of federal aviation policy is the federally-prescribed alternative to excessive cost. As the Senate Commerce Committee stated, "the committee has no intention of allowing airports to be priced out of existence." S. Rep. No. 446, 88th Cong., 1st Sess., 24 (1963). Contrary to the federal scheme the decision below prices airports out of existence in Indiana.

The end to be served is thus crippled. So too is the means chosen to achieve it. For the decision below makes operation of the federal scheme impossible. The predicate of the Federal Airport Act is that local government has the power to zone property adjacent to a public airport to assure compatible land use. As explained by the FAA Administrator in a letter quoted with approval in the Senate Report (S. Rep. No. 446, 88th Cong., 1st Sess., 22 (1963)):

> This power [to zone the land around airports] reposes in the State and its political subdivisions. If the airport sponsor lacks this authority because the airport is located outside the city limits, the neighboring city or county does not lack the authority. If neighboring jurisdictions refuse to exercise this authority for the welfare of their own citizens, the State could act. We have reached the point where we should insist upon an acknowledgement that achieving compatible land use in the vicinity of airports is a governmental responsibility which must be assumed at some jurisdictional level within the State.

The potent financial incentive of the grant-in-aid program is the federal means used to activate exercise of the power which it is taken for granted does exist. Judicial nullification of the fact of power immobilizes

the federal scheme. Extension of judicial nullification to a few key states like California, Illinois and New York would bring the National Airport Plan to a standstill. Since the premises of the Federal Airport Act are that (1) local power to zone exists, and that (2) federal financial stimulus can be reliably expected to activate the exercise of that power, judicial denial of the existence of any power which can be energized is totally inconsistent with the federal scheme. A state decision in conflict with a federal predicate can hardly rest on an adequate and independent state ground.

These considerations preclude a view that there exists a state ground independent of the federal ground adequate to support the judgment.

CONCLUSION

For the reasons stated the judgment should be reversed.

Respectfully submitted,

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APPENDIX A

Excerpts from Federal Airport Act, as Amended (60 Stat. 170, 78 Stat. 158, 49 U.S.C. § 1101)

SEC. 2. As used in this Act—

(1) "Administrator" means the Administrator of the Federal Aviation Agency.

(2) "Airport" means any area of land or water which is used, or intended for use, for the landing and take-off of aircraft, and any appurtenant areas which are used, or intended for use, for airport buildings or other airport facilities or rights-of-way, together with all airport buildings and facilities located thereon.

(3) "Airport development" means (A) any work involved in constructing, improving, or repairing a public airport or portion thereof, including the construction, alteration, and repair of airport passenger or freight terminal buildings and other airport administrative buildings and the removal, lowering, relocation, and marking and lighting of airport hazards, and (B) any acquisition of land or of any interest therein or of any easement through or other interest in air space, which is necessary to permit any such work or to remove or mitigate or prevent or limit the establishment of, airport hazards; but such term does not include the construction, alteration, or repair of airport hangars.

(4) "Airport hazard" means any structure or object of natural growth located on or in the vicinity of a public airport, or any use of land near such airport, which obstructs the airspace required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft.

(5) "Project" means a project for the accomplishment of airport development with respect to a particular airport.

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(7) "Public agency" means the United States Government or an agency thereof; a State, or Puerto Rico, the Virgin Islands, and Guam, or an agency of any of them; a municipality or other political subdivision; or a tax-supported organization.

(8) "Public airport" means any airport which is used or to be used for public purposes, under the control of a public agency, the landing area of which is publicly owned.

(9) "Sponsor" means any public agency which, either individually or jointly with one or more other public agencies, submits to the Administrator, in accordance with this Act, an application for a grant of funds for airport development.

* * *

NATIONAL AIRPORT PLAN

Formulation of Plan

SEC. 3. (a) The Administrator is hereby authorized and directed to prepare, and thereafter, at least three months prior to the close of each fiscal year, to revise, a national plan for the development of public airports in the United States, including Puerto Rico and the Virgin Islands. Such plan shall specify in terms of general location and type of development, the projects considered by the Administrator to be necessary to provide a system of public airports adequate to anticipate and meet the needs of civil aeronautics, which projects shall include all types of airport development eligible for Federal Aid under this Act and shall not be limited to any classes or categories of public airports. In formulating and revising such plan, the Administrator shall take into account the needs of both air commerce and private flying, the probable technological developments in the science of aeronautics, the probable growth and requirements of civil aeronautics, and such other considerations as he may deem appropriate, and shall to the extent feasible, consult, and give consideration to the views and recommendations of the Civil Aeronautics Board, the

States, Puerto Rico and the Virgin Islands, and their political subdivisions, and shall, to the extent feasible, consult and give consideration to the views and recommendations of, the Federal Communications Commission, and shall make all reasonable efforts to cooperate with that Commission for the purpose of eliminating, preventing, or minimizing airport hazards caused by construction or operation of any radio station. In carrying out this section the Administrator is authorized to make such surveys, studies, examinations, and investigations as he may deem necessary.

* * *

FEDERAL-AID AIRPORT PROGRAM

SEC. 4. (a) In order to bring about, in conformity with the national airport plan prepared and from time to time revised as provided in this Act, the establishment of a Nationwide system of public airports adequate to meet the present and future needs of civil aeronautics, the Administrator is authorized, within the limits of the obligation authority provided in section 5 to make grants of funds to sponsors for airport development and for advance planning and engineering therefor as hereinafter provided.

Announcement of Program

(b) It shall be the duty of the Administrator to make public by January 1 of each year the proposed program of airport development intended to be undertaken during the fiscal year next ensuing, and he may revise such program to the extent he finds necessary to accomplish the purposes of this Act.

* * *

SUBMISSION AND APPROVAL OF ADVANCE PLANNING AND ENGINEERING PROPOSALS AND PROJECTS

Submission

SEC. 9. (a) Subject to the provisions of subsections (b) and (c) of this section, any public agency, or two or more

public agencies acting jointly, may submit to the Administrator an advance planning and engineering proposal or a project application in such form, and containing such supporting information, as may be prescribed by the Administrator and setting forth the airport development proposed to be undertaken. No project application shall propose airport development other than that included in the then current revision of the national airport plan formulated by the Administrator under this Act, and all such proposed development shall be in accordance with standards established by the Administrator, including standards for site location, airport lay-out, grading, drainage, seeding, paving, lighting, and safety of approaches.

* * *

PROJECT SPONSORSHIP

SEC. 11. As a condition precedent to his approval of a project under this Act, the Administrator shall receive assurances in writing, satisfactory to him, that—

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination;

(2) such airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

(3) the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities

and purposes compatible with normal airport operations including landing and take-off of aircraft;

(5) all the facilities of the airport developed with Federal aid and all those usable for the landing and take-off of aircraft will be available to the United States for use by military and naval aircraft in common with other aircraft at all times without charge, except, if the use by military and naval aircraft shall be substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining the facilities so used;

(6) the airport operator or owner will furnish without cost to the Federal Government for use in connection with any air traffic control activities, or weather-reporting activities and communication activities related to air traffic control, such areas of land or water, or estate therein, or rights in buildings of the sponsor as the Administrator may consider necessary or desirable for construction at Federal expense of space or facilities for such purposes;

(7) all project accounts and records will be kept in accordance with a standard system of accounting prescribed by the Administrator after consultation with appropriate public agencies;

(8) the airport operator or owner will submit to the Administrator such annual or special airport financial and operations reports as the Administrator may reasonably request; and

(9) the airport and all airport records will be available for inspection by any duly authorized agent of the Administrator upon reasonable request.

To insure compliance with this section, the Administrator shall prescribe such project sponsorship requirements, consistent with the terms of this Act, as he may deem necessary. Among other steps to insure such compliance the

Administrator is authorized to enter into contracts with public agencies, on behalf of the United States. Whenever the Administrator shall obtain from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and shall construct thereon at Federal expense space or facilities, he is authorized to relieve the sponsor from any contractual obligation entered into under this Act to provide free space in airport buildings to the Federal Government to the extent he finds such space no longer required for the purposes set forth in paragraph (6) of this section.

GRANT AGREEMENTS

SEC. 12. Upon approving an advance planning and engineering proposal or a project application, the Administrator, on behalf of the United States, shall transmit to the sponsor or sponsors of the advance planning and engineering proposal or project application an offer to pay the United States share of the planning and engineering costs or allowable project costs. Any such offer shall be made upon such terms, and subject to such conditions, as the Administrator may deem necessary to meet the requirements of this Act and the regulations prescribed thereunder. Each such offer shall state a definite amount as the maximum obligation of the United States payable from funds authorized by this Act, and shall stipulate the obligations to be assumed by the sponsor or sponsors. If and when any such offer is accepted in writing by the sponsor or sponsors to which it is made, such offer and acceptance shall comprise a grant agreement constituting an obligation of the United States and of the sponsor or sponsors so accepting, and thereafter the amount stated in the accepted offer as the maximum obligation of the United States under such grant agreement shall not be increased by more than 10 per centum. Unless and until such a grant agreement has been executed, the United States shall not pay, nor be obligated to pay, any portion of the costs which have been or may be incurred.

APPENDIX B

Indiana Tall Structures Act (5 Burns Ind. Stat. 14-327 et seq. 1963 Cum. Supp.)

14-327. *Public use airport—Unobstructed conditions for safe flight.*—The safety, welfare and protection of persons and property in the air and on the ground and of the maintenance of electronic communication within this state requires that the navigable airspace overlying the state and the approaches to and the air traffic pattern area of any public use airport in this state be maintained in a reasonably unobstructed condition for the safe flight of aircraft. To that end, the location and height of structures and the use of land thereto related, is regulated. [Acts 1957, ch. 23, § 1, p. 37.]

14-328. *Definitions.*—As used in this act [§§ 14-327—14-341], unless the context otherwise requires: Commission means the aeronautics commission of Indiana. Structure means any object constructed or installed by man including, but not limited to, buildings, towers, smokestacks, electronic transmission or receiving towers and antennae, and overhead transmission lines;

Permit means a permit issued by the commission under the provisions of this act;

Public use airport means any area of land or water, or both, designed and set aside for the taking off and landing of aircraft and utilized or to be utilized in the interest of the public for such purposes; the term public use airport does not mean nor include a private landing field or personal landing field constructed and used primarily for the benefit of the owner thereof, nor shall it include any military airport or any other airport occupied by any federal or state military branch of government using such airport for military air purposes.

Person means and includes individuals, trustees, receivers, partnerships, associations, corporations for profit and

not for profit, religious corporations, municipal corporations and bodies politic. [Acts 1957, ch. 23, § 2, p. 37.]

14-329. *Permit required to erect, add to the height of or replace structure near public use airport.*—Until a permit therefor has been issued by the commission no person shall erect, add to the height of or replace any structure, unless such replacement only involves the repair, maintenance or restoration of an existing structure:

(a) within an area lying one thousand five hundred [1,500] feet on either side of the extended center line of a runway or landing strip for a distance of two [2] miles from the nearest boundary of any public use airport which will result in a structure extending to a height of more than one hundred fifty [150] feet above the level of such runway or landing strip; nor, within that portion of such area that is within a distance of three thousand [3,000] feet from such nearest boundary, that will result in a structure extending higher than a height above the level of such runway or landing strip determined by the ratio of one [1] foot vertically to every twenty [20] feet horizontally measured from such nearest boundary;

(b) at any other place within this state which will result in a structure extending more than five hundred [500] feet above the highest point of land within a one [1] mile radius from such structure. [Acts 1957, ch. 23, § 3, p. 37.]

14-330. *Excessive height—Restrictions—Issuance of permit.*—No permit shall be issued to erect, add to or replace any structure which will extend more than one thousand [1,000] feet above the highest point of land within a one [1] mile radius from the location of the structure, except as hereinafter provided, nor shall any person erect, add to or replace any structure for which a permit is required that exceeds the height allowed by the permit.

The commission may issue a permit to erect or add to a structure which will extend to a height of more than one

thousand [1,000] feet above the highest point of land within a one [1] mile radius from the location of the structure proposed to be erected or added to if such proposed structure will not be higher than fifty [50] feet above the height of the highest structure in existence on the effective date of this act [§§ 14-327—14-341] which is within a distance of one [1] mile from the location of the structure proposed to be erected or added to.

In any instance where permission of the federal government, or some agency thereof, is required for the erection of an electronic structure the commission shall not issue a permit for the erection thereof until federal permission is granted.

Whenever any person proposes to erect, add to the height of or replace any structure, which would be effected [affected] by the provisions and requirements of section 3(a) [§ 14-329] of this act, obtains consent in writing with verification, to erect, add to the height of or replace any such structure from the owner of the public use airport in the area, then the issuance of any permit under this act shall not be required, provided, however, that such person shall file a copy of such consent with the commission at least thirty [30] days prior to any work, construction, or installation on the proposed structure. [Acts 1957, ch. 23, § 4, p. 37.]

Compiler's Note. The bracketed word "affected" was inserted by the compiler.

14-331. *Application for permit.*—Application for a permit shall be made to the commission on a form prescribed and furnished by the commission.

It is not necessary that ownership of, option for or other possessory right that to a specific location site be held by the applicant before application for a permit is filed with the commission but any permit granted by the commission shall, among other things, state the location, either specif-

ically or within a definite area, and also the maximum height allowed for a structure. [Acts 1957, ch. 23, § 5, p. 37.]

14-332. *Visual identification characteristics specified in permit.*—Every permit granted shall also specify what, if any, obstruction markers, markings, lighting or other identification shall be installed on or in the vicinity of the structure. Such visual identification characteristics required shall conform to federal laws and regulations where applicable and, if permitted under federal laws and regulations, where lighting is specified the commission may require that the lights, or certain ones thereof, flash at the intervals and in a pattern specified in the permit. [Acts 1957, ch. 23, § 6, p. 37.]

14-333. *Investigation of application for permit—Notice of determination—Hearing, request of applicant for—Apperance of partics.*—Upon receiving an application for a permit the commission shall make such investigation as may be necessary to properly process the application under this act [§§ 14-327—14-341]. Such investigation shall be conducted so as to determine, in the opinion of the commission, a location and height for a structure for the particular purpose proposed in the location proposed as will best serve the safety and welfare of persons and property in the air and on the ground and other technical and economic factors involved. In considering and disposing of the application the safety and welfare of persons and property in the air and on the ground shall be deemed paramount to economic and technical factors.

If, upon such investigation, the commission determines that a permit should not issue or that the height or location should be other than as applied for, the commission shall thereupon notify the applicant in writing of its determination. Such notification may be served by delivering it personally to the applicant or by sending it by first class mail to the applicant at the address specified in the appli-

cation. Such determination shall become final twenty [20] days after notification thereof is served unless the applicant, within such twenty [20] day period, requests in writing that a hearing be held before the commission with reference to the application. All such hearings shall be open to the public. Any person interested may appear and be heard either in person or by counsel and may present such evidence and testimony as may be pertinent. [Acts 1957, ch. 23, § 7, p. 37.]

14-334. *Conduct of hearing.*—Any hearing conducted pursuant to the purposes and provisions of this act [§§ 14-327—14-341] shall be conducted in accordance with Chapter 360, Indiana Acts of 1945, as amended [§§ 14-312—14-325]. [Acts 1957, ch. 23, § 8, p. 37.]

14-335. *Action of commission—Procedure for appeal and judicial review.*—Procedure for appeal and judicial review of any commission action under this act shall be in accordance with existing law and procedure. [Acts 1957, ch. 23, § 9, p. 37.]

14-336. *Order to show cause why application for permit need not be obtained—Date for hearing.*—In any instance where the commission learns or has reasonable grounds to believe that any person is erecting or adding to a structure that would be subject to the provisions of this act [§§ 14-327—14-341] but concerning which no application for a permit has been filed, it may on its own motion issue an order to such person to appear before the commission and show cause why an application for a permit to erect or add to the structure need not be obtained. A date for a hearing thereon shall be set out in such order. [Acts 1957, ch. 23, § 10, p. 37.]

14-337. *Remedies of commission—Enforcement of law, and rules, regulations or orders of commission.*—In addition to any other remedy, the commission may institute in any court of competent jurisdiction an action to prevent, restrain, correct or abate any violation of the provisions

of this act [§§ 14-327—14-341] or of any rules, regulations or orders of the commission issued pursuant thereto. The court may grant such relief, by way of injunction or otherwise, as may be proper under all the facts and circumstances of the case in order to fully effectuate the purposes of this act and the rules, regulations and orders of the commission issued pursuant thereto. [Acts 1957, ch. 23, § 11, p. 37.]

14-338. *Rules and regulations, adoption and promulgation by commission—Administrative forms furnished by commission.*—The commission shall adopt and promulgate, and may from time to time amend or rescind, reasonable rules and regulations for the administration of this act [§§ 14-327—14-341.]

The commission shall prescribe and furnish forms necessary for the administration of this act. [Acts 1957, ch. 23, § 12, p. 37.]

14-339. *Exemption of area covered by airport zoning regulations—Change in height or location of prior structure.*—This act [§§ 14-327—14-341] shall not apply in any instance where the proposed erection, addition to or replacement of a structure is located in an area for which airport zoning regulations have been adopted pursuant to law are in effect.

This act shall not be construed to require any change in height or location of any structure in existence on the effective date of this act. [Acts 1957, ch. 23, § 13, p. 37.]

14-340. *Existing buildings or structures—Radio towers—Railroads—Application of law.*—The provisions of this act [§§ 14-327—14-341] shall not apply in respect to the location, relocation, erection, construction, reconstruction, change, alteration, maintenance, removal, use or enlargement of any existing buildings or structures, excepting any radio towers, nor shall the provisions of this act apply to any buildings or structures constructed in the future by

railroads, unless such building or structure lies within an approach zone of an existing airport as such zone is described in section 3(a) hereof [§ 14-329]. [Acts 1957, ch. 23, § 14, p. 37.]

14-341. *Penalty for violation.*—Whoever violates or fails to comply with the provisions of this act [§§ 14-327—14-341] is punishable by a fine of not less than ten dollars [$10.00] nor more than five hundred dollars [$500]. Each day that such violation or failure continues is a separate offense. [Acts 1957, ch. 23, § 15, p. 37.]

APPENDIX C

The Provision of the Indiana Enabling Statute Pertaining to the Adoption of Airport Zoning by a Municipality (5 Burns Ind. Stat. 14-422)

14-422. *Air space—Zoning—Condemnation—Effect—Regulations.*—In order to provide free air space for the safe descent, landing and ascent of aircraft and for the proper and safe use of any airport or landing field acquired or maintained under this act [§§ 14-412—14-433], such board of aviation commissioners is hereby given the right, power and authority, subject to approval and adoption, as provided by law, by the council of such municipality to establish and fix a restricted zone or zones for such distance in any direction from the boundaries of such airport or landing field, within which zone or zones so established, as in the opinion of said board is necessary and practicable, no building or other structure shall be erected high enough to interfere with the descent of an aircraft at such gliding angle as may be deemed necessary for safety for the usual type of operation that is conducted at such airport or landing field and said board may in the name of such municipality, acquire by condemnation, upon the payment of due compensation as hereinafter provided in this

act [§§ 14-412—14-433], the right to prevent the erection of, and to require the removal of, all buildings, towers, poles, wires, cables and other structures, and all trees within such zone or zones which interfere with such gliding angle or so much of any structure or trees as interferes with such gliding angle; and when so condemned no permit issued by any department or office of any such municipality or by any state or other authority for the erection of any structure inside any such zone or zones shall be effective and valid, unless approved by the board of aviation commissioners of such municipality. The establishing of any such restricted zone or zones outside of any such port or field as is herein provided, in connection with the condemnation of such rights in the land for the same, shall be understood to be condemnation and the perpetual annihilation of all rights of the owners of such property within such zone or zones to erect or maintain any building or structure whatever or any part thereof within such zones which will interfere with such gliding angle; or such result may be accomplished by absolute condemnation of the land, with perpetual and irrevocable free license to use and occupy such land within such zone for all purposes except the erection of buildings or other structure above the height so prescribed.

The jurisdiction of each municipality is hereby extended to the promulgation, administering and enforcement of airport zoning regulations to protect the approaches of any airport which is owned by said municipality but located wholly or partially outside the corporate limits of said municipality. In case of conflict with any airport zoning or other regulations promulgated by any municipality, the regulations adopted pursuant to this section shall prevail.

The zoning jurisdiction hereby granted shall, when exercised, be exclusive as against any such jurisdiction granted by any other law of this state now or hereafter adopted unless such other law specifically provides otherwise.

All airport zoning regulations adopted under this act [§§ 14-412—14-433] shall be reasonable and none shall impose any requirement or restriction which is not reasonably necessary to effectuate the purposes of this act [§§ 14-412—14-433]. In determining what regulations it may adopt, each municipality and joint airport zoning board shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain within the airport hazard area, the character of the neighborhood, and the uses to which the property to be zoned is put and adaptable. [Acts 1945, ch. 190, § 9, p. 591; 1949, ch. 109, § 6, p. 252.]

Amendments. The 1949 amendment substituted the word "council" for the words "governing authority" following the words "as provided by law, by the" in the first sentence. The amendment inserted the present third paragraph in the section.

APPENDIX D

UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE
OFFICE OF THE ADMINISTRATOR OF CIVIL AERONAUTICS
WASHINGTON 25, D. C.

TSO-N18
April 26, 1950

[As amended by Amendment 1, July 30, 1952.
Amendment 2, May 5, 1960]

Technical Standard Order

SUBJECT: CRITERIA FOR DETERMINING OBSTRUCTIONS TO AIR NAVIGATION

INTRODUCTION

In order to provide a uniform criteria for determining obstructions to air navigation, this standard has been developed by the Civil Aeronautics Administration in con-

junction with the Federal Communications Commission, the Department of Defense, and appropriate branches of the aviation and broadcasting industries.

DIRECTIVE

In accordance with the procedure for establishing technical aeronautical standards specified in Administrative Order No. 56, dated August 2, 1946, and Standard Practice No. 6370, the "Criteria for Determining Obstructions to Air Navigation" set forth below and as schematically shown on CAA Office of Airports Drawing No. 814 is established as a Technical Standard Order.

This standard is the official Civil Aeronautics Administration guide for determining obstructions to air navigation and supersedes all existing obstruction criteria which do not conform to its requirements.

SPECIFIC INSTRUCTIONS

PROCEDURE FOR DETERMINING OBSTRUCTIONS. Objects which project above the landing area or any of the airport referenced imaginary surfaces described in Section A shall be considered obstructions to air navigation. Objects exceeding the limiting heights above ground described in Section B shall be considered obstructions to air navigation unless found not to be objectionable after special aeronautical study. Objects which are located or will be located with respect to other objects of a permanent character such that there results no material increase in the aeronautical hazard will not be considered obstructions.

A. AIRPORT REFERENCED IMAGINARY SURFACES. These imaginary surfaces are established by reference to the airport as described below and consist of the approach surfaces, horizontal surface, conical surface, and transitional surfaces.

A.1. *Approach Surfaces.* The approach surface is an inclined plane located directly above the approach area.

The dimensions of the approach area are measured horizontally.

A.1.a. *Length.* The approach area has a length of 10,000 feet beginning 200 feet outward from the end of each runway and extending outward, ending at a point 10,200 feet from the end of the runway on the extended center line of the runway. In addition, the approach areas of all runways which may be used for instrument operation shall extend outward an additional 40,000 feet. The approach area requirements for instrument runways shall apply to all runways which may be used for instrument operations and to both ends of such runways.

A.1.b. *Width.* The approach area is symmetrically located with respect to the extended runway center line, and for all instrument runways has a total width of 1000 feet at the end adjacent to the runway. The approach area flares uniformly to a total width of 4,000 feet at the end of the 10,000 foot section and to a total width of 16,000 feet at the end of the additional 40,000 foot section. For all other runways not intended for instrument operation, the approach area has a total width at the end adjacent to the runway, and at the approach end respectively as follows: for Trunk Air Carrier Service as indicated in Technical Standard Order TSO-N6b, and larger airports, 500 feet and 2,500 feet; for Local Air Carrier Service airports, 400 feet and 2,400 feet; for Secondary airports, 250 feet and 2,250 feet.

A.1.c. *Slope.* For instrument runways the slope of the approach surface along the runway center line extended is 50:1 for the inner 10,000 foot section and 40:1 for the outer 40,000 foot section. For all other runways, not intended for instrument operation, which meet or exceed the minimum runway length requirements for Local Air Carrier Service specified in TSO-

N6b, the slope is 40:1. On airports with shorter runway lengths than those specified for Local Air Carrier Service the slope of the approach surface is 20:1 for all runways.

A.2. *Horizontal Surface.* The horizontal surface is a plane, circular in shape, with its height 150 feet above the established airport elevation and having a radius from the airport reference point as indicated in the following table:

Intercontinental Airports	13,000 feet
Continental Airports	11,500 feet
Trunk Airports	10,000 feet
Local Airports	7,000 feet
Secondary airports	5,000 feet

Except for Secondary these airports are defined in TSO-N6b. The established elevation of an airport is the elevation of the highest point of the usable landing area. The airport reference point is a point selected and marked at the approximate center of the airport landing area.

A.3. *Conical Surface.* The conical surface extends upward and outward from the periphery of the horizontal surface with a slope of 20:1 measured in a vertical plane passing through the airport reference point. Measuring radially outward, from the periphery of the horizontal surface, the conical surface extends for a horizontal distance of 7,000 feet for Intercontinental, Continental Airports, 5,000 feet for Trunk and Local Airports, and 3,000 feet for Secondary airports.

A.4. *Transitional Surfaces.* The transitional surfaces are inclined planes with a slope of 7:1 measured upward and outward in a vertical plane at right angles to the center line of the runway. The transitional surfaces, symmetrically located on either side of the runway, extend upward and outward from a line on either

side of the runway which is parallel to and level with the runway center line. These parallel lines are at a horizontal distance from the runway center line equal to one-half of the minimum width of the approach area indicated in A.1.b. above. Transitional surfaces extend from the edges of all approach surfaces upward and outward to the intersection with the horizontal surface, or the conical surface. The approach surfaces for instrument runways projecting through and beyond the limits of the conical surface have a 7:1 transitional surface extending a distance of 5,000 feet measured horizontally from the edge of the approach surfaces and at right angles to the runway center line.

B. Limiting Heights Above Ground. In addition to the requirements in Section A above, objects shall be considered obstructions to air navigation (unless special aeronautical study indicates otherwise) if they are more than 500 feet above ground or fall in the following categories:

B.1. Objects in instrument approach areas, more than 100 feet above the ground or 100 feet above the elevation of the approach end of the runway, whichever gives the higher elevation of the object, within three statute miles of the runway end, and increasing in height above ground in the proportion of 25 feet for each additional statute mile of distance outward from the runway end but not to exceed 250 feet within ten statute miles of the runway end.

B.2. Objects more than 170 feet above the ground or more than 170 feet above the established airport elevation, whichever gives the higher elevation of the object, within three statute miles of the reference point of a local or larger class airport, and increasing in height in the proportion of 100 feet for each additional mile of distance from the airport but not to exceed a maximum of 500 feet above ground.

B.3. Objects whose elevation would increase the final approach minimum flight altitude. The final approach minimum flight altitude is normally established from the highest point within five statute miles of the center line of the final approach course of a radio facility used for final let-down to an airport, and extends for a distance of ten statute miles along this course outward from the radio facility. The radio facility may be a radio range, non-directional beacon (H Marker), fan marker or the outer marker of an Instrument Landing System.

B.4. Objects within a civil airway or air traffic control area, more than 170 feet above the ground or more than an elevation that would require the increase in an established minimum flight altitude, whichever gives the higher elevation of the object. The minimum flight altitudes are normally established from the highest point within five statute miles of the center line of the civil airway or air traffic control area for the section of airway or control area affected.

D. W. RENTZEL
Administrator of Civil Aeronautics

APPENDIX E

Statement Describing Technical Standard Order N18

The following statement was prepared by the personnel of the Airports Service Office of the Federal Aviation Agency at the request of Petitioners to aid in the determination of this case by describing in nontechnical terms the history, meaning, and application of Technical Standard Order N18.

STATEMENT

Introduction

Federal Aviation Agency and its predecessor organizations have determined that for safe operation of aircraft the airspace in the vicinity of the airport should be free of objects above certain heights. Technical Standard Order (TSO) N18 prescribes specific standards for determining the airspace above the ground that should be free of structures and objects of natural growth to permit the free and unobstructed flight of aircraft in landing and taking off at an airport. These recommended standards have been applied throughout the country in the establishment of airport zoning regulations. Such standards have been applied in those regulations on the basis that the various height limits recommended have been determined as appropriate by the aeronautical agency of the Federal Government.

History

Criteria for the determination of obstructions to air navigation evolved as the aviation industry grew. The Air Commerce Act of 1926 provided for the "maintenance of lights and other signals on structures over navigable waters for the protection of air navigation". The Act also makes provision for the marking of objects near airports which constitute an obstruction to air navigation. Beginning about 1930, the Aeronautics Branch of the Department of Commerce published a series of bulletins entitled "Regula-

tions Governing Establishment and Certification of Aeronautical Lights and Recommended Standards for Marking Obstructions to Air Navigation". By 1941 these bulletins had been replaced by the "Aeronautical Lights and Obstruction Manual" developed by the Civil Aeronautics Administration. The Civil Aeronautics Act of 1938 required notice of construction for all structures along or near Civil Airways.

In the early 1930's there were many legal writings in favor of State enabling legislation providing for protection of airport approach and maneuver areas. The National Conference of Commissioners on Uniform Laws and the American Bar Association adopted the "Uniform Airport Act" in July 1935. This was model legislation which would enable political subdivisions of the State to acquire air rights over private property to insure safe approaches to landing areas of landing fields. Many states adopted such legislation beginning in 1939. By 1941 the Civil Aeronautics Administration and the National Institute of Municipal Law Officers, together, had developed and published a "Model Airport Zoning Act" which defined "aeronautical hazards".

During the same period, work had been started on the clarification of technical criteria to determine obstructions to air navigation. A mimeographed publication by the Bureau of Air Commerce entitled "Airport Approaches" presented, in addition to written definitions, approach and turning zones graphically illustrated. In 1939 the Civil Aeronautics Administration prepared Standard Drawing Number 152 depicting approach and turning zones for distribution to its field personnel for use in providing advisory assistance to airport owners and managers. This was revised in subsequent Drawings 152A, 152B, and 152C during the period ending January 1941. Changes in the characteristics of aircraft and their operational performance produced evolutionary developments in the standards for protective surfaces resulting in the promulgation of

Drawing 672 in September 1946. Further developments culminated in the preparation of Standard Drawing Number 814 which was incorporated in TSO-N18.

Due to the broad scope of the proposed obstruction criteria, coordination with the following aviation industry and other interested groups was solicited: The Air Transport Association, Aircraft Industries Association, Air Line Pilots Association, American Municipal Association, National Institute of Municipal Law Officers, United States Conference of Mayors, Aircraft Owners and Pilots Association, Independent Air Freight Association, Airport Operators Council, American Association of Airport Executives, National Association of State Aviation Officials, Civil Aeronautics Board, Federal Communications Commission, U. S. Navy, and Air Force. In April of 1950, after agreement had been reached by all segments of aviation, TSO-N18 was published.

In addition, in December of 1950, the Federal Communications Commission adopted as Part 17 of their regulations, with respect to the construction of broadcasting antennas and towers, the definitions and criteria in TSO-N18. The citation of the final rule, as published in the Federal Register in January 1951, is 16-FR-88.

Description of Criteria

The criteria set forth in TSO-N18, by means of imaginary surfaces constructed in the airspace in the environment of the airport, establish for any point on the ground surface the exact height less than which any object or natural growth would not be an obstruction. This height is simply the difference between the elevation at ground level and the elevation at the point vertically above it on the imaginary surface. Two areas have significance in this regard—an approach area associated with the landing area generally oriented along the axis of the runway and a circular area encompassing the airport and its immediate surroundings. The circular areas serve the purpose of providing cleared

areas adjacent to the landing field for circling maneuvers at the airport.

Four different types of airport imaginary surfaces are used. These are the approach surfaces, transitional surface, horizontal surface, and conical surface.

> Consider first the approach surfaces and associated transitional surfaces which make up a trough on the axis of the runway. The trough is widest at its outer extremity narrowing in the direction of the approach to the runway at approximately one foot laterally for each 10 feet along the axis. The entire trough is gently sloping downward to intersect a level imaginary surface at the runway end. The approach surfaces or the base of the trough may have different slopes depending upon the type of landing operation, operational rules affecting descent, or the runway length. On each side of the base of the trough is a steeply sloping surface called a transitional surface. The transitional surfaces provide closures from one surface to another. It is significant to note that aircraft are not flown along these imaginary surfaces but are operated above and within the areas protected.
>
> At a specified height above the established airport elevation, the horizontal surface, circular in shape, is the bottom of a pan which identifies the circular areas. The conical surface arising upward and outward from the horizontal surface makes up the sides of the pan.

All together, these four types of surfaces make up the imaginary surfaces in the airspace surrounding the airport. To put them together, consider that at the furthest point from the center of the airport an airplane circling for an approach in the vicinity of and turning onto the extended axis of the runway enters the approach trough and begins its descent for landing. The approach surfaces and associated transitional surfaces describing the area

of maneuvering are considered adequate for this purpose. At lower elevations, the trough will intersect the conical surface. At a still lower elevation, the approach surface will cut the bottom of the pan or the horizonal surface. The lowest elevation in any of the described imaginary surfaces is the controlling elevation and, thus, establishes the governing imaginary surface. The combination of the trough and the pan is continuous to the level of the controlling elevation at the extremities of the surfaces.

There are approach troughs associated with each end of the runway and for each runway on the airport. Thus, there is a combination of troughs intersecting conical and horizonal surfaces making up a complex shape described by the intersecting surfaces. Below the floor of the pan, the troughs continue toward the ground to the elevation of the runway end. There are also transitional surfaces associated with the lateral extremes of the ground operational area which provide surfaces below the horizonal surface. These surfaces are symmetrically located on each side of the runway parallel to and at the level of the runway centerline. Transitional surfaces extend upward from all approach surfaces to intersect the horizontal and conical surfaces.

APPENDIX F

July, 1960

Model Airport Zoning Ordinance

[Prepared By The Federal Aviation Agency]

FORWARD

Attached is a model airport zoning ordinance, incorporating a typical airport zoning plan, for use as a guide by the political subdivisions of those states which have enacted airport zoning enabling acts. Any airport zoning ordinance must, of course, conform to the prescribed authority of the particular airport zoning enabling act. There is also attached a copy of Technical Standard Order-N18,

which sets forth criteria for determining obstructions to air navigation. It is emphasized that this model ordinance is intended merely as a guide and will require modification and revision to meet the varying local circumstances and law. The model zoning ordinance is limited to zoning of runways; however, by appropriate change in terminology, it may also be applied to zoning for landing strips. The purpose of airport zoning is to prevent the creation or establishment of structures or objects of natural growth which would constitute hazards or obstructions to aircraft operating to and from a particular airport, by regulating and restricting the height of such structures and objects of natural growth in specified areas around the airport.

The model ordinance provides for the establishment of various zones required for the protection of the airport from the encroachment of obstructions or hazards to aircraft and defines these zones. The areas covered by these zones will vary from airport to airport depending upon, among other things, the size and layout of the airport, the type of aircraft using the airport, the elevation of the landing area above sea level, and the nature of the surrounding terrain. The model ordinance, therefore, leaves the specific zone measurements to be inserted by the political subdivision adopting the ordinance to suit the requirements of its particular airport. The size of these zones at each airport should be based on the standards established for the type of the airport by TSO-N18.

The Airports Branches of the several Regional Offices of the Federal Aviation Agency and the District Airport Engineers are available to assist in developing airport zoning regulations through advice as to the application of the criteria of TSO-N18 to the particular airport and the desired approach protection.

The model ordinance also prescribes height limitations for each of the zones established by the ordinance. Any height limitations imposed by an airport zoning ordinance

must be "reasonable" meaning that the height limitations prescribed should not be so low at any point as to constitute a taking of property without compensation. Therefore, the zoning ordinance should not purport to impose height limitations in any area where the approach slope is close to the ground, which is generally the case in the innermost portions of the approach zone. This problem is taken care of in the model ordinance in Section IV, Height Limitations, which provides that the ordinance shall not be construed as prohibiting the growth, construction, or erection of any tree or structure to a height not to exceed 45 feet.

In cases where the airport is located in an area of undeveloped and relatively barren land the excepted height may possibly be as low as 35 feet. On the other hand if the airport is located in an area that is somewhat built up and where normal use of the land may involve structures 40 to 50 feet in height it would probably be desirable to establish the excepted height limitation at 55 or possibly 60 feet.

In any event, the decision as to the excepted heigh limit to be applied or the distance from the airport at which the height limitations shall commence is one which should be made on the basis of local conditions and circumstances, including the uses being made of property in the vicinity of the airport. In making such decision, the political subdivision should use as much care and follow substantially the same procedure as is generally recognized as desirable in preparing comprehensive zoning ordinances.

Areas in the various zones where the applicable TSO-N18 height limit is below the excepted height limit prescribed in the ordinance should be protected by the acquisition of title or of a property interest sufficient to insure the required protection.

The model ordinance provides for the creation of a Board of Adjustment to hear appeals from decisions of the mu-

nicipal official designated to receive applications and issue permits and for judicial review of decisions of the Board of Adjustment. Such review and appeal procedures are intended to conform to the applicable constitutional requirements.

Attached to the model zoning ordinance and made a part thereof is a typical airport zoning plan. The plan attached to the model ordinance is a hypothetical map for a Trunk type airport according to TSO-N18. This plan is a map of the area affected by the airport zoning ordinance showing, among other things, the layout of the runways, the airport reference point, the airport boundaries, the airport elevation, and the topography of the area. The map also sets forth the various zones with the applicable height limitation for each, as described in the body of the ordinance. The hypothetical plan contains several methods of land identification, as typical in different areas of the country, such as Section, Township and Range, block and lot, metes and bounds, etc. The plan also depicts other identifying geographic objects such as streams, rivers, railroads, roads, streets, etc. By using a map with this amount of detail in conjunction with the text of the ordinance, a property owner may, without undue difficulty, determine not only the location of his property but also the height limitations imposed thereon by the ordinance.

If topographic maps of sufficient accuracy and detail are not available from local governmental sources, a suitable typographic map or maps (Quadrangle maps) might be obtained from the United States Department of the Interior, Geological Survey, Washington 25, D. C. That Agency has developed such maps for quite a large number of areas throughout the country. In addition, in many of the states, appropriate state agencies have available topographic maps developed by either the state or the United States Geological Survey.

MODEL AIRPORT ZONING ORDINANCE

[As corrected by errata sheet dated October 11, 1961]

AN ORDINANCE REGULATING AND RESTRICTING THE HEIGHT OF STRUCTURES AND OBJECTS OF NATURAL GROWTH, AND OTHERWISE REGULATING THE USE OF PROPERTY, IN THE VICINITY OF THE ..... AIRPORT BY CREATING AIRPORT APPROACH ZONES, TRANSITION ZONES, HORIZONTAL ZONE AND CONICAL ZONE, AND ESTABLISHING THE BOUNDARIES THEREOF; PROVIDING FOR CHANGES IN THE RESTRICTIONS AND BOUNDARIES OF SUCH ZONES; DEFINING CERTAIN TERMS USED HEREIN; REFERRING TO THE ..... AIRPORT ZONING MAP WHICH IS INCORPORATED IN AND MADE A PART OF THIS ORDINANCE; PROVIDING FOR ENFORCEMENT; ESTABLISHING A BOARD OF APPEALS; AND IMPOSING PENALTIES.[1]

This ordinance is adopted pursuant to the authority conferred by .....[2] It is hereby found that an airport hazard endangers the lives and property of users of .... Airport and of occupants of land in its vicinity, and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking-off and maneuvering of aircraft, thus tending to destroy or impair the utility of ..... Airport and the public investment therein. Accordingly, it is declared: (1) that the creation or establishment of an airport hazard is a public nuisance and an injury to the region served by ..... Airport; (2) that it is necessary in the interest of the public health, public safety and general welfare[3] that the creation or establishment of airport hazards be prevented,

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[1] This title may need to be revised to meet the usages and legal requirements of your State and the political subdivision in question.

[2] This citation should be made to conform to the usual method of citing your State's laws.

[3] If other terms are commonly used by the courts of your State in defining the limits of the police power, such as "convenience" or "prosperity", they should be added here.

and; (3) that the prevention of these hazards should be accomplished, to the extent legally possible, by the exercise of the police power without compensation. It is further declared that both the prevention of the creation or establishment of airport hazards and the elimination, removal, alteration, mitigation, or marking and lighting of existing airport hazards are public purposes for which political subdivisions may raise and expend public funds and acquire land or interests in land.

IT IS HEREBY ORDAINED BY .....[4] as follows:

SECTION I: SHORT TITLE

This ordinance shall be known and may be cited as "..... Airport Zoning Ordinance".

SECTION II: DEFINITIONS

As used in this Ordinance, unless the context otherwise requires:

(1) AIRPORT—Means ..... Airport.

(2) AIRPORT ELEVATION—Means the established elevation of the highest point on the usable landing area.

(3) AIRPORT HAZARD—Means any structure, tree or use of land which obstructs the airspace required for or is otherwise hazardous to the flight of aircraft in landing or taking-off at the airport.

(4) AIRPORT REFERENCE POINT—Means the point established as the approximate geographic center of the airport landing area and so designated.

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[4] A form of enacting clause commonly used by the political subdivision in adopting ordinances should be followed.

(5) BOARD OF ADJUSTMENT—Means a board consisting of ..... members appointed by the ..... as provided in .....[5]

(6) HEIGHT—For the purpose of determining the height limits in all zones set forth in this ordinance and shown on the zoning map, the datum shall be mean sea level elevation unless otherwise specified.

(7) INSTRUMENT RUNWAY—Means a runway equipped or to be equipped with electronic or visual air navigation aids adequate to permit the landing of aircraft under restricted visibility conditions.

(8) LANDING AREA—Means the area of the Airport used for the landing, take-off or taxiing of aircraft.

(9) NON-CONFORMING USE—Means any structure, tree, or use of land which is lawfully in existence at the time the regulation is prescribed in the Ordinance or an amendment thereto becomes effective and does not then meet the requirements of said regulation.

(10) NON-INSTRUMENT RUNWAY—Means a runway other than an instrument runway.

(11) PERSON—Means an individual, firm, partnership, corporation, company, association, joint stock association, or body politic, and includes a trustee, receiver, assignee, administrator, executor, guardian, or other representative.

(12) RUNWAY—Means the paved surface of an airport landing strip.

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[5] Insert the number of members appointed to the Board of Adjustment, the appointing body, and the enabling legislation authorizing same.

(13) Structure—Means an object constructed or installed by man, including, but without limitation, buildings, towers, smokestacks, and overhead transmission lines.

(14) Tree—Means any object of natural growth.

Section III—Zones

In order to carry out the provisions of this Ordinance, there are hereby created and established certain zones which include all of the land lying within the Instrument Approach Zones, Non-instrument Approach Zones, Transition Zones, Horizontal Zone and Conical Zone. Such areas and zones are shown on ..... Airport Zoning Map consisting of ..... sheets, prepared by ....., and dated ..... 19... which is attached to this ordinance and made a part hereof. The various zones are hereby established and defined as follows:

(1) Instrument Approach Zone—An instrument approach zone is established at each end of the instrument runway for instrument landings and take-offs. The instrument approach zones shall have a width of 1,000 feet at a distance of 200 feet beyond each end of the runway, widening thereafter uniformly to a width of 16,000 feet at a distance of 50,200 feet beyond each end of the runway, its centerline being the continuation of the centerline of the runway.

(2) Non-Instrument Approach Zone—A non-instrument approach zone is established at each end of all non-instrument runways on ..... Airport for non-instrument landings and take-offs. The non-instrument approach zone shall have a width of .....[6] feet at a distance of 200 feet

[6] The applicable distance in feet must be inserted for each service type of airport as explained in the Foreward to this model ordinance.

beyond each end of the runway, widening thereafter uniformly to a width of .....[6] feet at a distance of 10,200 feet beyond each end of the runway, its centerline being the continuation of the centerline of the runway.

(3) TRANSITION ZONES—Transition zones are hereby established adjacent to each instrument and non-instrument runway and approach zone as indicated on the zoning map. Transition zones symmetrically located on either side of runways, have variable widths as shown on the zoning map. Transition zones extend outward from a line .....[6] feet on either side of the center line of the non-instrument runway, for the length of such runway plus 200 feet on each end; and 500 feet on either side of the center line of the instrument runway, for the length of such runway plus 200 feet on each end, and are parallel and level with such runway center lines. The transition zones along such runways slope upward and outward (1) foot vertically for each (7) feet horizontally to the point where they intersect the surface of the horizontal zone. Further, transition zones are established adjacent to both instrument and non-instrument approach zones for the entire length of the approach zones. These transition zones have variable widths, as shown on the zoning map. Such transition zones flare symmetrically with either side of the runway approach zones from the base of such zones and slope upward and outward at the rate of (1) foot vertically for each (7) feet horizontally to the points where they intersect the surfaces of the horizontal and conical zones. Additionally, transition zones are established adjacent

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[6] The applicable distance in feet must be inserted for each service type of airport as explained in the Foreward to this model ordinance.

to the instrument approach zone where it projects through and beyond the limits of the conical zone, extending a distance of 5,000 feet measured horizontally from the edge of the instrument approach zones at right angles to the continuation of the center line of the runway.

(4) HORIZONTAL ZONE—A horizontal zone is hereby established as the area within a circle with its center at the Airport Reference Point and having a radius of .....[6] feet. The horizontal zone does not include the instrument and non-instrument approach zones and the transition zones.

(5) CONICAL ZONE—A conical zone is hereby established as the area that commences at the periphery of the horizontal zone and extends outward therefrom a distance of .....[6] feet. The conical zone does not include the instrument approach zones and transition zones.

SECTION IV: HEIGHT LIMITATIONS

Except as otherwise provided in this Ordinance, no structure or tree shall be erected, altered, allowed to grow, or maintained in any zone created by this Ordinance to a height in excess of the height limit herein established for such zone. Such height limitations are hereby established for each of the zones in question as follows:

(1) INSTRUMENT APPROACH ZONE—One (1) foot in height for each fifty (50) feet in horizontal distance beginning at a point 200 feet from and at the elevation of the end of the instrument runway and extending to a distance of 10,200 feet from the end of the runway; thence one (1) foot in height

[6] The applicable distance in feet must be inserted for each service type of airport as explained in the Foreward to this model ordinance.

for each forty (40) feet in horizontal distance to a point 50,200 feet from the end of the runway;

(2) NON-INSTRUMENT APPROACH ZONES—One (1) foot in height for each forty (40) feet in horizontal distance beginning at a point 200 feet from and at the elevation of the end of the non-instrument runway and extending to a point 10,200 feet from the end of the runway;

(3) TRANSITION ZONES—One (1) foot in height for each seven (7) feet in horizontal distance beginning at any point ..... feet normal to and at the elevation of the centerline of non-instrument runways extending 200 feet beyond each end thereof, and 500 feet normal to and at the elevation of the centerline of the instrument runway, extending 200 feet beyond each end thereof, extending to a height of 150 feet above the airport elevation which is ..... feet above mean sea level. In addition to the foregoing, there are established height limits of (1) foot vertical height for each (7) feet horizontal distance measured from the edges of all approach zones for the entire length of the approach zones and extending upward and outward to the points where they intersect the horizontal or conical surfaces. Further, where the instrument approach zone projects through and beyond the conical zone, a height limit of one (1) foot for each (7) feet of horizonal distance shall be maintained beginning at the edge of the instrument approach zone and extending a distance of 5,000 feet from the edge of the instrument approach zone measured normal to the centerline of the runway extended;

(4) HORIZONTAL ZONE—One hundred fifty (150) feet above the airport elevation or a height of ..... feet above mean sea level; and

(5) Conical Zone—One (1) foot in height for each twenty (20) feet of horizontal distance beginning at the periphery of the horizontal zone, extending to a height of *..... feet above the airport elevation.

Where an area is covered by more than one (1) height limitation, the more restrictive limitations shall prevail.

Nothing in this Ordinance shall be construed as prohibiting the growth, construction or maintenance of any tree or structure to a height up to 45 feet above the surface of the land.

Section V: Use Restrictions

Notwithstanding any other provisions of this Ordinance, no use may be made of land within any zone established by this Ordinance in such a manner as to create electrical interference with radio communication between the Airport and aircraft, make it difficult for flyers to distinguish between airport lights and others, result in glare in the eyes of flyers using the Airport, impair visibility in the vicinity of the Airport or otherwise endanger the landing, taking-off, or maneuvering of aircraft.

Section VI: Non-Conforming Uses

(a) Regulations not Retroactive. The regulations prescribed by this Ordinance shall not be construed to require the removal, lowering, or other changes or alteration of any structure or tree not conforming to the regulations as of the effective date of this Ordinance, or otherwise interfere with the continuance of any non-conforming use. Nothing herein contained shall require any change in the construction, alteration, or intended use of any structure, the con-

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* The number to be inserted here should be the elevation determined by appropriate computation pursuant to Paragraph A.7 of TSO-N1s for the category of airport involved.

struction or alteration of which was begun prior to the effective date of this Ordinance, and is diligently prosecuted.

(b) Marking and Lighting. Notwithstanding the preceding provision of this Section, the owner of any nonconforming structure or tree is hereby required to permit the installation, operation, and maintenance thereon of such markers and lights as shall be deemed necessary by the .....[7] to indicate to the operators of aircraft in the vicinity of the Airport, the presence of such airport hazards. Such markers and lights shall be installed, operated, and maintained at the expense of .....[8]

SECTION VII: PERMITS

(a) Future Uses—Except as specifically provided in paragraphs 1, 2 and 3 hereunder, no material change shall be made in the use of land and no structure or tree shall be erected, altered, planted or otherwise established in any zone hereby created unless a permit therefor shall have been applied for and granted. Each application for a permit shall indicate the purpose for which the permit is desired, with sufficient particularity to permit it to be determined whether the resulting use, structure or tree would conform to the regulations herein prescribed. If such determination is in the affirmative, the permit shall be granted.

(1) In the area lying within the limits of the Horizontal zone and the Conical Zone, no permit shall be required for any tree or structure less than 75 feet of vertical height above the ground, except when because of terrain, land contour or topographic features such tree or structure would extend above the height limits prescribed for such zone.

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[7] Insert here the title of the appropriate official who may be charged with the duty for determining the necessity for lighting and marking.

[8] Insert here the name of the appropriate political subdivision or body.

(2) In the areas lying within the limits of the instrument and non-instrument approach zones but at a horizontal distance of not less than 4,200 feet from each end of the runways, no permit shall be required for any tree or structure less than 75 feet of vertical height above the ground, except when such tree or structure would extend above the height limit prescribed for such instrument or non-instrument approach zone.

(3) In the areas lying within the limits of the transition zones beyond the perimeter of the horizontal zone, no permit shall be required for any tree or structure less than 75 feet of vertical height above the ground except when such tree or structure, because of terrain, land-contour or topographic features would extend above the height limit prescribed for such transition zones.

Nothing contained in any of the foregoing exceptions shall be construed as permiting or intending to permit any construction, alteration or growth of any structure or tree in excess of any of the height limits established by this Ordinance except as set forth in Section IV.

(b) Existing Uses. No permit shall be granted that would allow the establishment or creation of an airport hazard or permit a non-conforming use, structure, or tree to be made or become higher, or become a greater hazard to air navigation, than it was on the effective date of this Ordinance or any amendments thereto or than it is when the application for a permit is made. Except as indicated, all applications for such a permit shall be granted.

(c) Non-conforming Uses Abandoned or Destroyed. Whenever the .....[9] determines that a non-conforming structure or tree has been abandoned or more

[9] Insert here the title of the appropriate official charged with making this determination.

than 80 percent torn down, physically deteriorated, or decayed, no permit shall be granted that would allow such structure or tree to exceed the applicable height limit or otherwise deviate from the zoning regulations.

(d) Variances. Any person desiring to erect or increase the height of any structure, or permit the growth of any tree, or use his property, not in accordance with the regulations prescribed in this Ordinance, may apply to the Board of Adjustment for a variance from such regulations. Such variances shall be allowed where it is duly found that a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but will do substantial justice and be in accordance with the spirit of this Ordinance.

(e) Hazard Marking and Lighting. Any permit or variance granted may, if such action is deemed advisable to effectuate the purpose of this ordinance and be reasonable in the circumstances, be so conditioned as to require the owner of the structure or tree in question to permit the ..... at its own expense, to install, operate, and maintain thereon such markers and lights as may be necessary to indicate to flyers the presence of an airport hazard.

Section VIII: Enforcement

It shall be the duty of the .....[10] to administer and enforce the regulations prescribed herein. Applications for permits and variances shall be made to the .....[10] upon a form furnished by him. Applications required by this Ordinance to be submitted to the .....[10] shall be promptly considered and granted or denied by him. Applications for action by the Board of Adjustment shall be forthwith transmitted by the .....[10]

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[10] Insert here the title of the appropriate official, such as Building Inspector.

Section IX: Board of Adjustment

(a) There is hereby created a Board of Adjustment to have and exercise the following powers: (1) to hear and decide appeals from any order, requirement, decision, or determination made by the .....[10] in the enforcement of this Ordinance; (2) to hear and decide special exceptions to the terms of this Ordinance upon which such Board of Adjustment under such regulations may be required to pass; (3) to hear and decide specific variances.

(b) The Board of Adjustment shall consist of five members appointed by the .....[5] and each shall serve for a term of three (3) years and until his successor is duly appointed and qualified. Of the members first appointed one shall be appointed for a term of one (1) year, two for a term of two (2) years and two for a term of three (3) years. Members shall be removable by the appointing authority for cause, upon written charges, after a public hearing.

(c) The Board of Adjustment shall adopt rules for its governance and procedure in harmony with the provisions of this Ordinance. Meetings of the Board of Adjustment shall be held at the call of the Chairman and at such other times as the Board of Adjustment may determine. The Chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All hearings of the Board of Adjustment shall be public. The Board of Adjustment shall keep minutes of its proceedings showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall immediately be filed in the office of the .....[10] and shall be a public record.

(d) The Board of Adjustment shall make written findings of fact and conclusions of law giving the facts upon

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[10] Insert here the title of the appropriate official, such as Building Inspector.

which it acted and its legal conclusions from such facts in reversing, affirming, or modifying any order, requirement, decision, or determination which comes before it under the provisions of this Ordinance.

(e) The concurring vote of a majority of the members of the Board of Adjustment shall be sufficient to reverse any order, requirement, decision, or determination of the .....[10] or to decide in favor of the applicant on any matter upon which it is required to pass under this Ordinance, or to effect any variation in this Ordinance.

SECTION X: APPEALS

(a) Any person aggrieved, or any taxpayer affected, by any decision of the .....[10] made in his administration of this Ordinance, if of the opinion that a decision of the .....[10] is an improper application of these regulations, may appeal to the Board of Adjustment.

(b) All appeals hereunder must be taken within a reasonable time as provided by the rules of the Board of Adjustment, by filing with the .....[10] a notice of appeal specifying the grounds thereof. .....[10] shall forthwith transmit to the Board of Adjustment all the papers constituting the record upon which the action appealed from was taken.

(c) An appeal shall stay all proceedings in furtherance of the action appealed from, unless the .....[10] certifies to the Board of Adjustment, after the notice of appeal has been filed with it, that by reason of the facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case, proceedings shall not be stayed except by order of the Board of Adjustment on notice to the agency from which the appeal is taken and on due cause shown.

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[10] Insert here the title of the appropriate official, such as Building Inspector.

(d) The Board of Adjustment shall fix a reasonable time for hearing appeals, give public notice and due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

(e) The Board of Adjustment may, in conformity with the provisions of this Ordinance, reverse or affirm, in whole or in part, or modify the order, requirement, decision or determination appealed from and may make such order, requirement, decision, or determination, as may be appropriate under the circumstances.

Section XI: Judicial Review

Any person aggrieved, or any taxpayer affected, by any decision of the Board of Adjustment, may appeal to the Court of ..... as provided in Section ... of Chapter... of the Public Laws of .....[11]

Section XII: Penalties

Each violation of this Ordinance or of any regulation, order, or ruling promulgated hereunder shall constitute a misdemeanor and be punishable by a fine of not more than ..... or imprisonment for not more than ..... days or both such fine and imprisonment, and each day a violation continues to exist shall constitute a separate offense.

Section XIII: Conflicting Regulations

Where there exists a conflict between any of the regulations or limitations prescribed in this Ordinance and any other regulations applicable to the same area, whether the conflict be with respect to the height of structures or trees,

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[11] Consideration should be given the desirability of setting forth this procedure here, or as an alternative attaching to all copies of this ordinance, a copy of excerpts from the statute cited.

the use of land, or any other matter, the more stringent limitation or requirement shall govern and prevail.

Section XV: Severability

If any of the provisions of this Ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Section XVI: Effective Date

Whereas, the immediate operation of the provisions of this Ordinance is necessary for the preservation of the public health, public safety, and general welfare, and Emergency is hereby declared to exist, and this ordinance shall be in full force and effect from and after its passage by the ..... Airport Zoning Board and publication and posting as required by law. Adopted by the ..... Board this .... day of ...., 19.....

APPENDIX G

February 1947

SUGGESTED MODEL

AIRPORT ZONING ORDINANCE

DESIGNED TO EFFECTUATE THE MODEL CAA-NIMLO STATE AIRPORT ZONING ACT OF NOVEMBER 7, 1944

Foreword

The attached is a suggested draft of a model airport zoning ordinance for adoption by political subdivisions of a State which has enacted an airport zoning enabling act conforming to the model airport zoning act of November 7, 1944, prepared and sponsored by the Civil Aeronautics Administration and the National Institute of Municipal Law Officers.

While this suggested ordinance follows the model act in most respects, there are some features of it and some related matters which should be considered.

First, it will be seen that the ordinance draft does not include specific zone limits, or height restrictions, merely providing in Sections 3 and 4 for their insertions by the political subdivisions adopting it. This omission is accounted for in part by the fact that the regulations to be prescribed in each such ordinance must be adapted to the particular airport, taking into account, among other things, the nature of the airport, its size and layout, the nature of the aircraft operations to be accommodated, wind directions, velocities, and frequencies, the elevation of the landing area above sea level, the nature of the surrounding terrain, and the height, location, and nature of the existing obstructions. However, the Civil Aeronautics Administration is always glad to assist political subdivisions and others interested in formulating airport zoning regulations, by having a representative of its Airport Service advise as to what aerial approaches a particular airport should have.

Such aeronautical considerations, however, are not the only ones that should be taken into account in determining what the regulations should be. It is hardly necessary to point out that any airport zoning regulation must, as is stated in Section 6(1) of the model act, be "reasonable", meaning that the height limits prescribed may not be so low that they would constitute a taking of property without compensation in violation of the Federal and State Constitutions. Since CAA standards call for unobstructed airspace above 30 or 40 to 1 flight path beginning at the end of the runway at ground level, it is apparent that a height limit as low as that necessary cannot be imposed by the airport zoning method for some distance from the end of the runway, this distance depending upon many factors such as the use made of the property in the neighborhood. Consequently, it should be decided locally, after the necessary airport approach flight paths have been determined, the distance from the airport within which the height of structures may not be so limited without being confiscatory, and from this point to the airport boundary aviation easement or title should be acquired as provided in Section 13 of the model act.

In view of these considerations, it is believed that any political subdivision in promulgating airport zoning regulations should use as much care and follow substantially the same procedure as is generally recognized as desirable in preparing a comprehensive community zoning ordinance. Consequently, it is suggested that airport zoning regulations should be based upon a master airport approach plan prepared on the basis of a thorough study of the problem, with the advice of technical experts and after consulting the property owners affected.

In this connection, it should be noted that the model act prescribes certain steps as to hearing and notice to be taken before zoning regulations are adopted under its authority and requires that such regulations be adopted on the basis

of the recommendations of an airport zoning commission (see Section 5 of the model act). These provisions are, of course, jurisdictional and should therefore be strictly complied with.

In addition, it is suggested that it may be desirable to make provision in an airport zoning ordinance for the issuance of certificates of occupancy. In the event that the adopting political subdivision already issues such certificates under a general zoning ordinance, the certificate form might be altered to include a statement that the structure or use in question conforms to the airport zoning regulations as well as to the restrictions in the general zoning ordinance. However, if such certificates are not issued and it is felt that this would be a desirable practice, it is suggested that reference be made to the model provisions on this subject which are set forth at page 18 of Building and Housing Publications HB 16 of the Department of Commerce, "The Preparation of Zoning Ordinances", a copy of which may be obtained from the Superintendent of Documents, Government Printing Office, at a price of ten cents.

Lastly, it is suggested that consideration be given the desirability and feasibility of including a provision in such an ordinance to the effect that the findings of fact of the Board of Adjustment, if supported by substantial evidence, shall be conclusive on appeal.

MODEL AIRPORT ZONING ORDINANCE

(February, 1947)

Civil Aeronautics Administration, U. S. Department of Commerce

and

National Institute of Municipal Law Officers

AN ORDINANCE REGULATING AND RESTRICTING THE HEIGHT OF STRUCTURES AND OBJECTS OF NATURAL GROWTH, AND OTHERWISE REGULATING THE USE OF PROPERTY, IN THE VICINITY OF THE ..... MUNICIPAL AIRPORT BY CREATING AIRPORT APPROACH, TURNING AND TRANSITION ZONES AND ESTABLISHING THE BOUNDARIES THEREOF; PROVIDING FOR CHANGES IN THE RESTRICTIONS AND BOUNDARIES OF SUCH ZONES; DEFINING CERTAIN TERMS USED HEREIN; PROVIDING FOR ENFORCEMENT; ESTABLISHING A BOARD OF APPEALS; AND IMPOSING PENALTIES.[1]

In pursuance of the authority conferred by Chapter .... of the Public Laws of .....[2] and for the purpose of promoting the health, safety and general welfare[3] of the inhabitants of ....., by preventing the creation or establishment of airport hazards, thereby protecting the lives and property of users of the ..... Municipal Airport and of occupants of land in its vicinity and preventing destruction or impairment of the utility of the Airport and the public investment therein;

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[1] This title may need to be revised to meet the usages and legal requirements of your State, and the political subdivision in question.

[2] This citation should be made to conform to the usual method of citing your State's laws.

[3] If other terms are commonly used by the courts of your State in defining the limits of the police power, such as "convenience" or "prosperity", they should be added here.

IT IS HEREBY ORDAINED BY THE ..... OF THE ....., ..., as follows:[4]

Section 1. Short Title. This ordinance shall be known and may be cited as the "Airport Zoning Ordinance of the ....."

Section 2. Definitions. As used in this ordinance, unless the context otherwise requires:

(1) "Airport" means the ..... Municipal Airport.

(2) "Airport hazard" means any structure or tree or use of land which obstructs the airspace required for the flight of aircraft in landing or taking-off at the airport or is otherwise hazardous to such landing or taking-off of aircraft.

(3) "Non-conforming use" means any structure, tree, or use of land which does not conform to a regulation prescribed in this ordinance or an amendment thereto, as of the effective date of such regulations.

(4) "Person" means any individual, firm, co-partnership, corporation, company, association, joint stock association or body politic, and includes any trustee, receiver, assignee, or other similar representative thereof.

(5) "Structure" means any object constructed or installed by man, including, but without limitation, buildings, towers, smoke-stacks, and overhead transmission lines.

(6) "Landing area" means the area of the Airport used for the landing, take-off, or taxiing of aircraft.

(7) "Tree" means any object of natural growth.

Section 3. Zones. In order to carry out the purposes of this ordinance, all of the land within the boundaries of the ..... and within ..... miles of the land-

[4] The form of enacting clause commonly used by the political subdivision in question should be employed.

ing area of the Airport, is hereby divided into airport approach zones, airport turning zones and airport transition zones, the boundaries of which are shown on the ..... Airport Approach Plan numbered ..... and dated ....., which is attached hereto and hereby made a part hereof.

Section 4. Height Limits. Except as otherwise provided in this ordinance, no structure or tree shall be erected, altered, allowed to grow, or maintained in any airport approach zone, airport turning zone or airport transition zone to a height in excess of the height limit herein established for such zone. For purposes of this regulation, the following height limits are hereby established for each of the zones in question:

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.....
.....
.....

Section 5. Use Restrictions. Notwithstanding any other provisions of this ordinance, no use may be made of land within any airport approach zone, airport turning zone or airport transition zone, in such a manner as to create electrical interference with radio communication between the Airport and aircraft, make it difficult for flyers to distinguish between airport lights and others, result in glare in the eyes of flyers using the Airport, impair visibility in the vicinity of the Airport, or otherwise endanger the landing, taking-off, or maneuvering of aircraft.[5]

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[5] If it is desired that certain particular land uses be forbidden within certain airport approach, turning or transition zones, it is suggested that provisions be inserted in this Section, immediately following the heading, reading substantially as follows: "Except as otherwise provided in this ordinance, it shall be unlawful to put any land located within an airport approach zone, airport turning zone or airport transition zone to any use hereby forbidden in such zone. The land uses forbidden in the various airport approach, turning and transition zones are as follows: .....
.....

Section 6. Non-conforming uses. The regulations prescribed in Sections 4 and 5 of this ordinance shall not be construed to require the removal, lowering, or other change or alteration of any structure or tree not conforming to the regulations as of the effective date hereof, or otherwise interfere with the continuance of any non-conforming use. Nothing herein contained shall require any change in the construction, alteration, or intended use of any structure the construction or alteration of which was begun prior to the effective date of this ordinance, and is diligently prosecuted and completed within two years thereof.

Section 7. Variances. Any person desiring to erect any structure or increase the height of any structure, or permit the growth of any tree, or use his property, not in accordance with the regulations prescribed in this ordinance, may apply for a variance therefrom. Such variance shall be allowed where a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of this ordinance.

Section 8. Permits.

(1) *Future Uses.* No material change shall be made in the use of land, and no structure or tree shall be erected, altered, planted, or otherwise established, in any airport approach zone, airport turning zone or airport transition zone, unless a permit therefor shall have been applied for and granted. Each such application shall indicate the purpose for which the permit is desired, with sufficient particularity to permit it to be determined whether the resulting use, structure, or tree would conform to the regulations herein prescribed. If such determination is in the affirmative, the permit applied for shall be granted.

(2) *Existing Uses.* Before any existing use, structure or tree may be replaced, substantially altered or repaired,

rebuilt, allowed to grow higher, or replanted, within any airport approach zone, airport turning zone or airport transition zone, a permit must be secured authorizing such replacement, change or repair. No such permit shall be granted that would allow the establishment or creation of an airport hazard or permit a non-conforming use, structure, or tree to be made or become higher, or become a greater hazard to air navigation, than it was on the effective date of this ordinance or than it is when the application for a permit is made. Except as indicated, all applications for a permit for replacement, change or repair of existing use, structure, or tree shall be granted.

Section 9. Hazard Marking and Lighting. Any permit or variance granted under Section 7 or 8 may, if such action is deemed advisable to effectuate the purposes of this ordinance and reasonable in the circumstances, be so conditioned as to require the owner of the structure or tree in question to permit the ....., at its own expense, to install, operate, and maintain thereon such markers and lights as may be necessary to indicate to flyers the presence of an airport hazard.

Section 10. Appeals.

(1) Any person aggrieved, or taxpayer affected, by any decision of the ..... made in its administration of this ordinance, or the ..... of ....., if of the opinion that a decision of the ..... is an improper application of this ordinance, may appeal to the Board of Adjustment for which provision is made in Section 12.

(2) All appeals taken under this Section must be taken within a reasonable time, as provided by the rules of the Board, by filing with the ..... and with the Board, a notice of appeal specifying the grounds thereof. The ..... shall forthwith transmit to the Board all

the papers constituting the record upon which the action appealed from was taken.

(3) An appeal shall stay all proceedings in furtherance of the action appealed from, unless the ..... certifies to the Board, after the notice of appeal has been filed with it, that by reason of the facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case, proceedings shall not be stayed otherwise than by order of the Board on notice to the ..... and on due cause shown.

(4) The Board shall fix a reasonable time for the hearing of the appeal, give public notice and due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

(5) The Board may, in conformity with the provisions of this ordinance, reverse or affirm, wholly or partly, or modify, the order, requirement, decision, or determination appealed from and may make such order, requirement, decision, or determination as ought to be made, and to that end shall have all the powers of the .....

(6) The Board shall make written findings of fact and conclusions of law giving the facts upon which it acted and its legal conclusions from such facts in reversing, or affirming, or modifying any order, requirement, decision, or determination which comes before it under the provisions of this ordinance.

(7) The concurring vote of a majority of the members of the Board shall be sufficient to reverse any order, requirement decision, or determination of the ....., or to decide in favor of the applicant on any matter upon which it is required to pass under this ordinance, or to affect any variation in this ordinance.

Section 11. Administrative Agency. The .....[6] is hereby designated the administrative agency charged with the duty of administering and enforcing the regulations herein prescribed. The duties of the ..... shall include that of hearing and deciding all permits under Section 8, but the ..... shall not have or exercise any of the powers or duties herein delegated to the Board of Adjustment.

Section 12. Board of Adjustment.

(1) There is hereby created a Board of Adjustment[7] to have and exercise the following powers:

(a) To hear and decide appeals from any order, requirement, decision, or determination made by the ..... in the enforcement of this ordinance;

(b) To hear and decide special exceptions to the terms of this ordinance upon which such Board may be required to pass by subsequent ordinances;

(c) To hear and decide specific variances under Section 8.

(2) The Board of Adjustment shall consist of 5 members, each to be appointed for a term of 3 years and to be removable for cause by the .....[8] upon written charges and after public hearing. In the first instance, one member shall be appointed for a term of 3 years, 2 for a term of 2 years, and 2 for a term of one year. Thereafter each member appointed shall serve for

[6] If the political subdivision in question has an Inspector of Buildings, it is suggested that he be designated the administrative agency for this ordinance.

[7] This provision may be omitted if the political subdivision in question has already established such a Board. In that event, however, this section should grant the powers here set out to the existing Board.

[8] Indicate the proper appointing authority.

a term of 3 years or until his successor is duly appointed and qualified.

(3) The Board shall adopt rules for its governance and procedure in harmony with the provisions of this ordinance. Meetings of the Board shall be held at the call of the chairman and at such other times as the Board may determine. The chairman, or in his absence the acting chairman, may administer oaths and compel the atendance of witnesses. All hearings of the Board shall be public. The Board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall immediately be filed in the office of the Board and shall be a public record.

Section 13. Judicial Review. Any person aggrieved, or taxpayer affected, by any decision of the Board of Adjustment, or the ..... of the ....., may appeal to the court of ..... as provided in Section ..... of Chapter ..... of the Public Laws of .....[9]

Section 14. Penalties.[10] Each violation of this ordinance or of any regulation, order or ruling promulgated hereunder shall be punishable by a fine of not more than $..... or imprisonment for not more than ..... days, or both such fine and imprisonment, and each day a violation continues shall be a separate offense.

Section 15. Conflicting Regulations. Where this ordinance imposes a greater or more stringent restriction upon the use of land than is imposed or required by any other ordinance or regulation, the provisions of this ordinance shall govern.

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[9] Consideration should be given the desirability of setting forth this procedure here, or, as an alternative, attaching to all copies of this ordinance, a copy of excerpts from the statute cited.

[10] It is possible that this Section may have to be modified to conform to the Constitution of your State.

Section 16. Severability. If any of the provisions of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are declared to be severable.

Section 17. Effective Date. This ordinance shall take effect .....

APPENDIX I

Excerpts from Grant Agreement Between the City of Gary, Indiana, and the Civil Aeronautics Administration of June 1949

DEPARTMENT OF COMMERCE
CIVIL AERONAUTICS ADMINISTRATION
WASHINGTON 25

GRANT AGREEMENT

Part I—Offer

Date of Offer June 22, 1949
Gary Municipal Airport
Project No. 9-12-007-701

To: The City of Gary, Indiana
(herein referred to as the "Sponsor")

FROM: The United States of America (acting through the Administrator of Civil Aeronautics, herein referred to as the "Administrator")

WHEREAS, the Sponsor has submitted to the Administrator a Project Application dated March 11, 1949 for a grant of Federal funds for a project for development of the Gary Municipal Airport (herein called the "Airport"), together with plans and specifications for such project, which Project Application, as approved by the Administrator, is hereby incorporated herein and made a part hereof; and

WHEREAS, the Administrator has approved a project for development of the Airport (herein called the "Project") consisting of the following described airport development:

Land acquisition; clear and grub; grade; drain; turf; pave N/S (approx. 100′ x 3100′) and NW/SE (approx. 100′ x 3600′) runways, apron (approx. 150′ x 175′) and connecting taxiway; construct entrance road; furnish and install segmented circle marker and wind indicating device; approach clearance.

all as more particularly described in the survey map and plans and specifications incorporated in the said Project Application;

Now Therefore, pursuant to and for the purposes of carrying out the provisions of the Federal Airport Act (60 Stat. 170; Pub. Law 377, 79th Congress), and in consideration of (a) the Sponsor's adoption and ratification of the representations and assurances contained in said Project Application, and its acceptance of this Offer, as hereinafter provided, and (b) the benefits to accrue to the United States and the public from the accomplishment of the Project and the operation and maintenance of the Airport, as herein provided,

The Administrator, for and on Behalf of the United States, Hereby Offers and Agrees to pay, as the United States' share of costs incurred in accomplishing the project, 25 percentum of the allowable land acquisition costs and 50 percentum of all other allowable project costs, subject to the following terms and conditions:

1. The maximum obligation of the United States payable under this Offer shall be $166,000.00.

2. The Sponsor shall

   (a) begin accomplishment of the Project within a reasonable time after acceptance of this Offer, and

   (b) carry out and complete the Project in accordance with the terms of this Offer, and the Federal Airport Act and the Regulations promulgated thereunder by the Administrator in effect on the date of this Offer, which Act and Regulations are incorporated herein and made a part hereof, and

   (c) carry out and complete the Project in accordance with the plans and specifications incorporated herein as they may be revised or modified with the approval of the Administrator or his duly authorized representatives.

3. The Sponsor shall operate and maintain the Airport as provided in the Project Application incorporated herein.

4. Any misrepresentation or omission of a material fact by the Sponsor concerning the Project or the Sponsor's authority or ability to carry out the obligations assumed by the Sponsor in accepting this Offer shall terminate the obligation of the United States, and it is understood and agreed by the Sponsor in accepting this Offer that if a material fact has been misrepresented or omitted by the Sponsor, the Administrator on behalf of the United States may recover all grant payments made.

5. The Administrator reserves the right to amend or withwdraw this Offer at any time prior to its acceptance by the Sponsor.

6. This Offer shall expire and the United States shall not be obligated to pay any of the allowable costs of the Project unless this Offer has been accepted by the Sponsor within 60 days from the above date of Offer or such longer time as may be prescribed by the Administrator in writing.

7. The Administrator, in tendering this offer in behalf of the United States, recognizes the existence of an agency relationship between the City of Gary, Indiana, and the Director of the Aeronautics Commission of Indiana, created by an Agency Agreement, executed by the President of the Board of Aviation Commissioners of Gary, Indiana on February 14, 1949, and by the Chairman of the Aeronautics Commission of Indiana on March 7, 1949, a copy of which is attached hereto and made a part hereof; and the Sponsor agrees that it will not amend, modify, or terminate said Agency Agreement without the prior approval, in writing, of the Administrator or his duly designated representative.

The Sponsor's acceptance of this Offer and ratification and adoption of the Project Application incorporated herein shall be evidenced by execution of this instrument by the Sponsor, as hereinafter provided, and said Offer and acceptance shall comprise a Grant Agreement, as provided by the Federal Airport Act, constituting the obligations and rights of the United States and the Sponsor with respect to the accomplishment of the Project and the operation and maintenance of the Airport. Such Grant Agreement shall become effective upon the Sponsor's acceptance of this Offer and shall remain in full force and effect throughout the useful life of the facilities developed under the Project but in any event not to exceed twenty years from the date of said acceptance.

UNITED STATES OF AMERICA
THE ADMINISTRATOR OF CIVIL AERONAUTICS

By GEORGE W. WEST
Regional Administrator, Region III

Part II—Acceptance

The City of Gary, Indiana, does hereby ratify and adopt all statements, representations, warranties, covenants, and agreements contained in the Project Application and incorporated materials referred to in the foregoing Offer and does hereby accept said Offer and by such acceptance agrees to all of the terms and conditions thereof.

Executed this 28th day of June, 1949.

CITY OF GARY, INDIANA
(*Name of Sponsor*)

By O. W. BADER
President, Board of Aviation Commissioners, City of Gary.

(SEAL)

ATTEST: C. H. SHAFER
Secretary

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UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE

CIVIL AERONAUTICS ADMINISTRATION
WASHINGTON, D. C.

PROJECT APPLICATION

For Federal Aid for Development of Public Airports

PART I

PROJECT INFORMATION

The City of Gary (herein called the "Sponsor") hereby makes application to the Administrator of Civil Aeronautics (herein called the "Administrator") for a grant of Federal funds pursuant to the Federal Airport Act of 1946 and the Regulations issued thereunder, for the purpose of aiding in financing a project (herein called the "Project") for development of the Gary Municipal Airport (herein called the "Airport") located at latitude 41° 37′ N, longitude 87° 22′ W, in the City of Gary of the State of Indiana.

It is proposed that the Project consist of the following described airport development:

Gary Municipal Airport, first stage construction consisting of grading, drainage, clearing, paving, in re SE-NW runway and N-S runway approximately 100′ x 3600′ together with parking apron and connecting taxi strip, seeding and sodding adjacent areas, providing access roadway and auto parking space as well as miscellaneous necessary construction.

Also acquisition of a ten acre tract of land within the airport site at a cost as shown under Item 1.

* * *

PART II

REPRESENTATIONS

In order to induce the United States to enter into a Grant Agreement with respect to the Project, the Sponsor hereby represents and certifies as follews:

1. LEGAL AUTHORITY—The Sponsor has the legal power and authority: (1) to do all things necessary in order to undertake and carry out the Project in conformity with the Act and the Regulations; (2) to accept, receive, and disburse grants of funds from the United States in aid of the Project, on the terms and conditions stated in the Act and the Regulations; and (3) to carry out all of the provisions of Parts III and IV of this Project Application.

2. FUNDS—The Sponsor now has on deposit, or is in a position to secure, $168,930.50 for use in defraying the costs of the Project. The present status of these funds is as follows: On deposit at Gary Trust & Savings Bank.

The above amount does not include the estimated U. S. Government share of the land costs, to-wit: $1,350.00.

3. LAND—The Sponsor holds the following property interests in the following tracts of land . . . which are to be developed or used as part of or in connection with the Airport, all of which lands are identified on the survey map which is attached hereto as Exhibit "A": Fee simple.

4. APPROVALS OF OTHER AGENCIES—The Project has been approved by all non-federal agencies whose approval is required, namely: Aeronautics Commission of Indiana.

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7. FUTURE DEVELOPMENT — The Sponsor intends ultimately to develop the Airport as proposed in the current Master Plan Layout for the Airport, which plan has been mutually agreed upon by the Sponsor and the Administrator; and intends to proceed with such further development when it is necessary and feasible. The Sponsor fur-

ther represents that pending such further development and to the extent of its ability to do so, it intends to acquire the lands and interests therein necessary for such development or to take such other action as will protect such proposed lands or interests from any development thereof inconsistent with the intended airport use.

PART III

SPONSOR'S ASSURANCES

In order to furnish the Administrator the Sponsor's assurances required by the Act and the Regulations, the Sponsor hereby covenants and agrees with the United States, as follows:

1. These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal aid for the Project or any portion thereof, made by the Administrator, and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under the Project but in any event not to exceed twenty years from the date of said acceptance of an offer of Federal aid for the Project.

2. The Sponsor will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport open to all types, kinds and classes of aeronautical use without discrimination between such types, kinds and classes; *Provided,* That the Sponsor may establish such fair, equal and non-discriminatory conditions to be met by all users of the Airport as may be necessary for the safe and efficient operation of the Airport; *And Provided Further,* That the Sponsor may prohibit any given type, kind or class of aeronautical use of the Airport if such action will best serve the aeronautical needs of the area served by the Airport.

3. The Sponsor will not exercise, grant or permit any exclusive right for the use of the Airport forbidden by Section 303 of the Civil Aeronautics Act of 1938, as amended. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will not either directly or indirectly exercise, or grant to any person, firm or corporation, or permit any person, firm or corporation to exercise, any exclusive right for the use of the airport for commercial flight operations, including air carrier transportation, rental of aircraft, conduct of charter flights, operation of flight schools or the carrying on of any other service or operation requiring the use of aircraft.

4. The Sponsor agrees that it will operate the Airport for the use and benefit of the public, on fair and reasonable terms and without unjust discrimination. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically covenants and agrees:

(a) That in any agreement, contract, lease or other arrangement under which a right or privilege at the Airport is granted to any person, firm, or corporation to render any service or furnish any parts, materials or supplies (including the sale thereof) essential to the operation of aircraft at the Airport, the Sponsor will insert and enforce provisions requiring the contractor:

(1) to furnish good, prompt and efficient service* adequate to meet all the demands for its service* at the Airport.

(2) to furnish said service* on a fair, equal and non-discriminatory basis to all users thereof, and

(3) to charge fair, reasonable and non-discriminatory prices for each unit of sale or service*; *Provided,* That the contractor may be allowed to make reasonable and

* See footnote on page 71a.

non-discriminatory discounts, rebates or other similar types of price reductions to volume purchasers.

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8. Insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, taking-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a zoning ordinance and regulations or by the acquisition of easements or other interests in lands or airspace, or by both such methods. With respect to land outside the boundaries of the airport, the Sponsor will also remove or cause to be removed any growth, structure, or other object thereon which would be a hazard to the landing, taking-off, or maneuvering of aircraft at the Airport, or if such removal is not feasible, will mark or light such growth, structure, or other object as an airport obstruction or cause it to be so marked or lighted. The airport approach standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946, unless otherwise authorized by the Administrator.

9. All facilities of the Airport developed with Federal aid and all those usable for the landing and taking-off of aircraft will be available to the United States at all times, without charge, for use by military and naval aircraft in common with other aircraft, except that if the use by military and naval aircraft is substantial, a reasonable

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* Note: As used in these subsections the word "service" shall include furnishing of parts, materials and supplies (including sale thereof) as well as furnishing of service.

share, proportional to such use, of the cost of operating and maintaining facilities so used, may be charged. The amount of use to be considered "substantial" and the charges to be made therefore shall be determined by the Sponsor and the using agency.

10. The Sponsor will furnish to any civil agency of the United States, without charge (except for light, heat, janitor service, and similar facilities and services at the reasonable cost thereof), such space in airport buildings as may be reasonably adequate for use in connection with any airport air traffic control activities, weather-reporting activities, and communications activities related to airport air traffic control, which are necessary to the safe and efficient operation of the Airport and which such agency may deem it necessary to establish and maintain at the Airport for such purpose.

* * *

13. The Sponsor will maintain a master plan of the Airport having the current approval of the Administrator. Such plan shall show building areas, approach areas, and landing areas, indicating present and future proposed development. The Sponsor will conform to such master plan in making any future improvements or changes at the Airport which, if made contrary to the master plan, might adversely affect the safety, utility, or efficiency of the Airport.

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PART IV

PROJECT AGREEMENT

If the Project or any portion thereof is approved by the Administrator and an offer of Federal aid for such approved project is accepted by the Sponsor, it is understood and agreed that all airport development included in such project will be accomplished in accordance with the Act and the Regulations, the plans and specifications for

such development, as approved by the Administrator, and the Grant Agreement with respect to the project.

IN WITNESS WHEREOF, the Sponsor has caused this Project Application to be duly executed in its name, this 11th day of March, 1949.

CITY OF GARY

By O. W. BADER
President, Board of Aviation Commissioners.